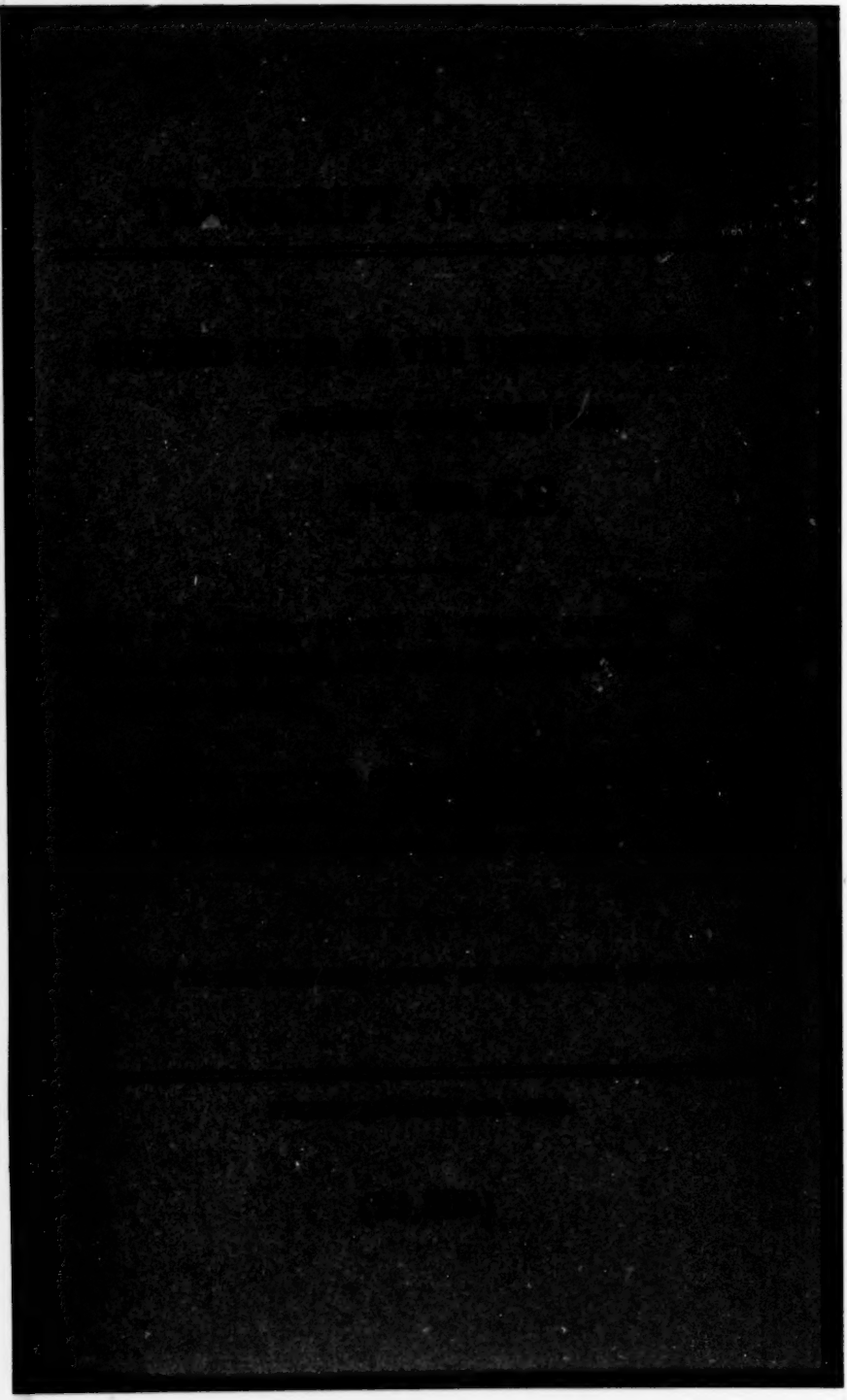

(21,309)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 240.

JOHN F. CALDER, DAVID A. CROW, JOHN E. MORE, THOMAS H. KEOGH, AND WILLARD KINGSLEY, PLAINTIFFS IN ERROR,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN, BY THE ATTORNEY GENERAL, AT THE RELATION OF GEORGE E. ELLIS, MOSES TAGGART, AND SAMUEL A. FRESHNEY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 15, 1910.

1 *Information.*

In the Circuit Court.

THE PEOPLE OF THE STATE OF MICHIGAN, by the Attorney General, at the Relation of George E. Ellis, Moses Taggart, and Samuel A. Freshney, Plaintiff and Appellee,

vs.

JOHN F. CALDER, DAVID A. CROW, JOHN E. MORE, THOMAS H. KEOGH, and WILLARD KINGSLEY, Respondents and Appellants.

STATE OF MICHIGAN,
County of Kent, ss:

John E. Bird, Attorney General of the state of Michigan, on the relation of George E. Ellis, Samuel A. Freshney and Moses Taggart, comes into said Circuit Court for the county of Kent, according to the statute in such case made and provided, and gives the court here to understand and be informed that John F. Calder, David A. Crow, John E. More, Thomas H. Keogh and Willard Kingsley, of the City of Grand Rapids, county of Kent and state of Michigan, for the space of, to-wit, twenty days last past, have acted and still do act under the name and style of the Grand Rapids Hydraulic Company as a corporation within this state, to-wit, at said City of Grand Rapids and elsewhere, without then and there being legally incorporated, in contempt of the people of the state of Michigan, and to their great damage and prejudice. Wherefore the said Attorney General prays for due process of law against the said John F. Calder, David A. Crow, John E. More, Thomas Keogh and Willard Kingsley in this behalf to be made to answer to the said people by what warrant they claim to act as a corporation as aforesaid.

JOHN E. BIRD,
Attorney General, Lansing, Mich.

MOSES TAGGART,
GANSON TAGGART,
Of Counsel, Grand Rapids, Mich.

2 *Rule to Plead.*

STATE OF MICHIGAN:

The Circuit Court for the County of Kent.

JOHN E. BIRD, Attorney General, on Relation of George E. Ellis, Samuel A. Freshney, and Moses Taggart, Plaintiffs,

vs.

JOHN F. CALDER, DAVID A. CROW, JOHN E. MORE, THOMAS H. KEOGH, and WILLARD KINGSLEY, Respondents.

On filing an information in the nature of a quo warranto pursuant to statute, and on motion of John E. Bird, attorney for plain-

tiff, pursuant to rule, it is ordered that said respondents plead to such information within twenty days after service upon them of the summons issued herein and a copy of this rule, and that in default thereof judgment be entered against said respondents.

Dated December 7, 1906.

JOHN E. BIRD,
Attorney for Plaintiffs.

MOSES TAGGART,
GANSON TAGGART,
Counsel.

Summons.

STATE OF MICHIGAN:

In the Circuit Court for the County of Kent.

In the Name of the People of the State of Michigan.

To the Sheriff of the County of Kent:

You are hereby commanded to summon John F. Calder, David A. Crow, John E. More, Thomas H. Keogh and Willard Kingsley, if found in your bailiwick, to appear *to* the said Circuit Court for the county of Kent and state of Michigan, to answer the in-
3 formation in the nature of a quo warranto filed against them by the Attorney General of the state of Michigan, such appearance and answer to be made in accordance with the rules and practice of the said court, within twenty days after service of this summons together with a copy of said information and of a rule to plead. Service of this summons shall be made on or before the twentieth day of December, A. D. 1906, which is the return day hereof.

Witness, Hon. Willis B. Perkins, one of the judges of the said Circuit Court for the county of Kent and state of Michigan, and the seal of said court at the City of Grand Rapids, Michigan, the place of holding said court, this seventh day of December, 1906.

CONNOR H. SMITH, *Clerk,*
By R. A. MOSHER, *Dep. Clerk.*

JOHN E. BIRD,
Attorney General;
Business Address, Lansing, Michigan.
MOSES TAGGART,
GANSON TAGGART,
Of Counsel,
Grand Rapids, Michigan.

Proof of Service.

Albert A. Carroll, Sheriff.
Harmon A. Cowens, Under Sheriff.

State of Michigan,
Sheriff's Office, Kent County,
Grand Rapids, Mich.

STATE OF MICHIGAN,
County of Kent, ss:

I hereby certify and return, that on the 10th day of December, A. D. 1906, at the City of Grand Rapids, in said county, I served the annexed summons upon David A. Crow and Thomas H. Keogh, two of the defendants named in said summons, by then
4 and there showing to each of said above named defendants the annexed summons, with the seal of the court impressed thereon, and delivering to each of said defendants a true copy of said summons.

ALBERT A. CARROLL, *Sheriff,*
By LOUIS GODZWAARD,
Deputy Sheriff.

My fees, $1.70.

Albert A. Carroll, Sheriff.
Harmon A. Cowens, Under Sheriff.

State of Michigan,
Sheriff's Office, Kent County,
Grand Rapids, Mich.

STATE OF MICHIGAN,
County of Kent, ss:

I do hereby certify and return, that on the 12th day of December, A. D. 1906, at the City of Grand Rapids, in said county, I served the annexed summons upon John F. Calder, John E. More and Willard Kingsley, three of the defendants named in said summons, by then and there showing to each of said above named defendants the within summons, with the seal of the court impressed thereon, and delivering to each of said defendants a true copy of said summons.

ALBERT A. CARROLL, *Sheriff,*
By HARMON COWENS,
Under Sheriff.

My fees, $2.30.

21354. The State of Michigan. The Circuit Court for the County of Kent. Attorney General vs. John F. Calder et al. Summons, etc. Original. To the Sheriff of Kent County: You are hereby directed to serve the within summons and rule to plead and

information on within named respondents, John F. Calder, David A. Crow, John E. More, Thomas H. Keogh and Willard Kingsley. John E. Bird, attorney general, attorney for plaintiff. Moses Taggart and Ganson Taggart, of counsel. Received and filed December 14, 1906. Louis H. Dolan, deputy clerk.

5 *Plea.*

STATE OF MICHIGAN:

In the Circuit Court for the County of Kent.

THE PEOPLE OF THE STATE OF MICHIGAN, by the Attorney General, at the Relation of George E. Ellis, Moses Taggart, and Samuel A. Freshney, Plaintiff,

vs.

JOHN F. CALDER, DAVID A. CROW, JOHN E. MORE, THOMAS H. KEOGH, and WILLARD KINGSLEY, Respondents.

And now, on this second day of January, 1907, come the said John F. Calder, David A. Crow, John E. More, Thomas H. Keogh and Willard Kingsley, respondents, by Kingsley and Wicks, their attorneys, and having heard the information read, they complain that, under color of the premises of the said information, they are greatly vexed and this by no means justly, because, protesting that the said information and the matters therein contained are by no means sufficient in the law, yet for plea thereunto, they say that:

1. At the time of the exhibiting of the said information and for upwards of fifty-seven years last past there was and had been in the city of Grand Rapids, Michigan, a water supply company duly incorporated pursuant to an act of the legislature of the state of Michigan, passed on the second day of April, 1849, entitled, "An Act to incorporate the Grand Rapids Hydraulic Company;" said act is printed in the volume entitled, "Laws of Michigan, 1848-

6 49," and appears as Act No. 223 of the laws of 1849, on pages 298, 299, 300, 301, 302, 303, and 304 of said volume. During all the time last aforesaid, the said President and Directors of the Grand Rapids Hydraulic Company were and now are a corporation having its office and place of business in said city of Grand Rapids. These respondents allege that each and all of them were duly elected within the past year as directors of said corporation to serve until the first Tuesday of next May, and until their successors shall be elected and qualified; that the board of directors consists of five members; each and all of said respondents qualified and duly accepted their respective positions as lawful directors of the said corporation, since which time they and each of them have been and now are lawful directors of the said corporation, and as such rightfully have acted and so do act under the name and style of the President and Directors of the Grand Rapids Hydraulic Company as an existing corporation, with the exception that the respondent, David A. Crow, resigned from said board of directors on the 12th

day of December, 1906, since which time said David A. Crow has ceased to act as one of the directors or in any other capacity under the name and style of the Grand Rapids Hydraulic Company, and the said David A. Crow disclaims any right to act or exercise any function belonging to or connected with the said Hydraulic Company after the said 12th day of December, 1906, when James R. Fitzpatrick, of Grand Rapids, took the place of the respondent, David A. Crow, as one of the lawful directors of said Grand Rapids Hydraulic Company. These respondents further aver, that the act incorporating the President and Directors of the Grand Rapids Hydraulic Company in 1849 is still in full force and unrepealed.

The Hydraulic Company was duly authorized to supply water from springs, from Coldbrook and the lakes from which this brook had its source, with power to lay pipes, make reservoirs, and
7 do all necessary things to enable it to carry on the business of supplying and distributing pure and wholesome water for household and domestic uses in Grand Rapids, and, also, to supply water for the extinguishment of fires. Pursuant to such power and authority, the Hydraulic Company, soon after it was incorporated, constructed and put into operation a water supply plant in Grand Rapids and has from time to time extended its plant and developed its system; it has an excellent supply of water drawn from springs, located a short distance up the river and outside the corporate limits of the city; it has modern pumps, engines of the latest design; many miles of iron mains and pipe lines, properly connected with buildings, and a large number of consumers paying agreed rates for water supplied by it to them.

2. These respondents further aver that the city of Grand Rapids was expressly authorized in 1872 to construct a municipal system of water works for the purpose of supplying the city with water for domestic and other purposes. Such city works were shortly thereafter built and from time to time extended and improved, at an outlay of many hundred thousands of dollars; that the Hydraulic Company and the city have been engaged in sharp competition in the water supply business; that the mains and pipes of the two systems parallel each other in some of the principal streets; that owing to such competition, the city in October, 1886, claiming such competition was ruinous to the water business of the city, filed a bill in chancery against the Hydraulic Company in the Superior Court of Grand Rapids for the purpose of obtaining a permanent injunction against the Hydraulic Company from further operating its then existing plant or extending and developing it in the future, to which bill the Hydraulic Company filed an answer. Voluminous proofs were taken and the Supreme Court on an appeal, adjudicated in July, 1887, as reported in 66 Michigan, 606, that the bill of complaint made out no case for relief and that none was called for.

8 3. These respondents further aver as a fact, that the city, not bring content with the enjoyment of its own rights, did in the spring of 1905, through its mayor and the Common Council, together with other of its officers, representatives and agents, carefully plan an effort to crush the Hydraulic Company and take away

all of its franchises by legislative action without notice or process and without hearing, for the benefit of the municipal treasury, and merge the plant of the company into the public system without paying just compensation to the Hydraulic Company. This designed scheme has been partially executed and carried out in the following mode and manner:

A communication was made by the Mayor of the city to the Common Council on March 20, 1905, recommending that the legislature be induced to repeal without delay the Hydraulic charter, whereupon Alderman Joseph Renihan then moved that Moses Taggart, then City Attorney, be instructed to draw a bill in accordance with the recommendation of the Mayor, which motion was unanimously carried without debate; this motion, also directed a copy of the bill to be furnished, not to the Hydraulic Company, but only to the senators and representatives from Kent county, being seven in number. The said Moses Taggart, in pursuance of such aforesaid plan and directions, without delay drew, as City Attorney, a bill for the absolute repeal of the charter of the said Hydraulic Company. He delivered or caused to be delivered a copy thereof to Representative George E. Ellis and Senator Andrew Fyfe, and the other members of the Kent county delegation then in the legislature; said City Attorney, acting in his official capacity, and also for and in behalf of the Mayor and Common Council of the city, urged and requested Representative Ellis and Senator Fyfe, and other members of the Kent county delegation to introduce such bill into the legislature at once and if possible, cause it to be passed immediately,
9 without notice to the Hydraulic Company and without a hearing or an opportunity for the Hydraulic Company to be heard on the merits of said bill; all of which constituted in substance and in fact an application by the city to the legislature to alter and annul the charter of the Hydraulic Company for the benefit of the city. Whereupon said Representative George E. Ellis, of Grand Rapids, in part execution of said plan and concurring and complying with such unreasonable requests of the Mayor, Common Council and City Attorney, on the 28th day of March, 1905, without giving any notice whatever to the said Hydraulic Company, its officers or agents, did introduce into the House of Representatives the aforesaid bill, and also then moved a suspension of the rules of the House and the passage of the said bill at once without having said bill referred to the Judiciary Committee of the House or any other committee and without giving the Hydraulic Company any opportunity to be heard on the merits thereof. The said bill was then read the first and second times by its title, and pending reference to a committee, Representative George E. Ellis moved that rule No. 46 be suspended and the bill be placed on its immediate passage. This motion prevailed and the bill was then read a third time and the question being on its passage, a motion was made by Representative Carl E. Manes, of Grand Rapids, that the bill be laid on the table, which motion was carried.

These respondents further aver, that on the evening of March 28th, 1905, the officers of the Hydraulic Company learned for the

first time from outside sources that a bill to repeal its charter had that day been introduced into the legislature; that on the morning of March 29th, 1905, John E. More, who was the Vice President and Secretary of the Hydraulic Company, and Thomas H. Keogh, of the city of Grand Rapids, who represented several non-resident stockholders in and bondholders of the Hydraulic Company, went
10 to Lansing, where they had separate interviews at the capitol building with Representative George E. Ellis and Senator Andrew Fyfe, before the legislative session began on that day; they then and there protested to them against the passage of said bill in the mode and manner contemplated; they then and there with insistency, requested the said Senator and Representative to afford the Hydraulic Company a fair opportunity to be heard on the merits of the bill, but this protest was relentlessly ignored and such urgent and reasonable requests were unconditionally rejected and absolutely refused by both Representative George E. Ellis and Senator Andrew Fyfe, who, at the capitol building, then had charge of this measure pending in the legislature.

These respondents further say, that on the same day, being the one following the introduction of the bill, by unanimous consent the aforesaid bill was taken from the table and passed at once by the House without reference to a committee and without debate, all the members voting yea.

These respondents further say, that on the same day Senator Andrew Fyfe moved in the Senate, then in session, that its rules be suspended and the aforesaid bill be placed on its immediate passage, which motion prevailed. The said bill was then read a third time and passed, two-thirds of all the Senators elected voting therefor and none against it. The secretary of the Senate then informed the House that the Senate had concurred in the passage of the aforesaid bill, whereupon it was referred by the House to the Clerk for printing and presentation to the Governor.

These respondents further aver that it was then an established custom in the legislature of this state, when the members from a particular district are a unit on a pending measure affecting only their own district and not the people of the state generally, for all other members of the legislature to vote for such pending local measure at the request of the members from such local district,
11 expressed through their Representatives and Senators, having the bill in charge, without investigating the merits thereof, and without, in fact, exercising their judgment or discretion on the merits of the subject matter involved in such local bill.

These respondents further aver, as a fact, that the said passage of the said bill as aforesaid was brought about by the statements and representations made by said Representative George E. Ellis and said Senator Andrew Fyfe, having the measure in charge, that the delegation from Kent county was a unit in favor of said bill; that it did not involve a subject in which the people of the state of Michigan were interested, whereas, in point of fact, the charter so attempted to be repealed was not in its nature a mere local matter nor a contract between the city and the Hydraulic Company, but on

the contrary, was a valid and legal existing contract, entered into between the State of Michigan as one party, and the Hydraulic Company as the other party, in the year 1849. The members of the legislature outside of Kent county relied upon the aforesaid representations and statements and voted for the bill as aforesaid without in fact exercising their judgment or discretion at all upon the merits of the so-called local measure.

These respondents further aver, that on April 5, 1905, Thomas J. O'Brien, who was then receiver of the Hydraulic Company, having been appointed by the Circuit Court of the United States for the Sixth Circuit, Western District of Michigan, Southern Division, in Equity, on foreclosure proceedings, then pending in said court against the said Hydraulic Company, and Alfred C. Seekell, who was then a director of the said Hydraulic Company, together with said Thomas H. Keogh, representing non-resident stockholders in and bondholders of said Hydraulic Company, appeared in the Governor's room at the capitol building and protested against his approval of the aforesaid bill so as aforesaid passed, on the ground, among others, that said bill was confiscatory in its nature and had been passed without notice to the Hydraulic Company or any of its offi-
12 cers or agents and without it having an opportunity to be heard on the merits of the bill either in the House or Senate, but Edwin F. Sweet, then the Mayor of the city of Grand Rapids, and Moses Taggart, then the City Attorney, and Alvah W. Brown, a member of the Board of Public Works of said city, having charge of the municipal water works, represented in behalf of such municipality that it was legal under the reserved power of the legislature, to alter or repeal the special charter of the Hydraulic Company, for the Governor to then and there approve said bill so as aforesaid passed, and Governor Warner, complying with such unreasonable statements and requests, approved said bill on April 5, 1905; it becoming Act No. 455 of the Local Acts of the Session of 1905.

These respondents further aver, as a fact, that the only opportunity the said Hydraulic Company or any of its officers or agents ever had for a hearing on said bill, was the aforesaid hearing before the Governor on the 5th of April, 1905; that such sole opportunity was granted by Governor Warner at the request of the receiver of the company and some of its stockholders and bondholders.

These respondents further aver that the aforesaid motion of Representative George E. Ellis, that the said bill be passed with the aforesaid speed, was premature and contrary to the parl*ai*mentary law of the House and such unallowable and unprecedented speeding of the bill through the legislature, caused it to be again brought before that body and re-passed in the following manner: On the 12th day of April, 1905, Senator Andrew Fyfe, previous notice under the rules having been given and leave granted, re-introduced the identical bill hereinbefore referred to and it was read a first and second time by its title and pending reference to a committee, said Senator Fyfe moved a suspension of the rules and that the bill be placed on its immediate passage; which motion prevailed, all of

the Senators present voting therefor. It was then read a
13 third time and without debate or reference to a committee,
passed, two-thirds of all the Senators elected acting according to the established custom hereinbefore mentioned, voting therefor and none voting against it.

These respondents further aver, that on the following day, April 13, 1905, the said bill was received in the House, with a message from the Secretary of the Senate, informing the House that the Senate had passed the bill and ordered the same to take immediate effect; thereupon the said bill was read a first and second time by its title and pending its reference to a committee, the said Representative, George E. Ellis moved that Rule No. 46 be suspended and that the said bill be placed upon its immediate passage; this motion prevailed, all of the representatives present voting therefor; the said bill was then read a third time and passed by two-thirds vote of all the representatives elected, who acted according to the established custom hereinbefore mentioned, concerning local measures, and there were no votes against this bill upon the second passage of it in the House.

These respondents further aver, that the last passage of the aforesaid bill by the Senate and the House was introduced by the reliance of the legislature upon the usage and established custom relating to purely local measures and by the statements and representations made to said Senate and House by Senator Andrew Fyfe and Representative George E. Ellis, upon which the members of the legislature relied, and which were in substance the same as those aforesaid, which as aforesaid induced the first passage of it; they were to the effect that the members of the Kent county delegation were a unit in favor of the passage of said bill; that it did not involve a subject in which the people of the State of Michigan at large were interested, but was in its nature a local measure, confined
in effect to the city of Grand Rapids, whereas in fact, it was
14 a bill involving a general public question and intended to
revoke an express legal contract entered into by the people of this State on the one hand and the Hydraulic Company on the other.

These respondents aver, that the second and last passage if the bill as aforesaid did not receive the real assent of a majority of the members of each house who were present and voted, for, although they in form voted yea, nevertheless they did so nominally and as a mere form, but not otherwise; they voted yea as aforesaid in compliance with the aforesaid established custom relating to local measures and in reliance upon the aforesaid representations and the special request of the members of the legislature from Kent county, expressed through Representative Ellis and Senator Fyfe, both of Grand Rapids.

The respondents further aver that thereafter and on April 20, 1905, said bill so as aforesaid re-passed by the legislature was again presented to the Governor and by him approved on the 25th day of April, 1905, becoming Act No. 492 of the Local Acts of 1905.

These respondents further aver, as a fact, that neither the said

Hydraulic Company nor any of its officers or agents had any notice of a contemplated re-introduction and repassage of said bill, nor did said Hydraulic Company have any opportunity to be heard, either in the Senate or the House on the merits thereof.

These respondents also show, that the said three relators are officers of the city, George E. Ellis being its present Mayor, Moses Taggart was and still is City Attorney, and Samuel A. Freshney is the General Manager of the City Water Works; they are the authorized agents of the municipality to assist in carrying to consummation the aforesaid designed plan and the avowed policy of the city to put the Hydraulic Company out of business and merge its plant into the city system; that as such representatives and agents, they induced Attorney General Bird to begin these proceedings on
1. the ground that the subject involved was one in which the people of the state of Michigan were interested, and that it was not a local question, nor did it involve a mere matter of local concern.

4. These respondents further show, that in order to extend its system and conduct its business, the Hydraulic Company on the 9th day of September, 1886, executed and delivered to the American Loan and Trust Company of Boston, Massachusetts, as trustee, a valid trust mortgage on its plant and other tangible property, and also, included in said trust mortgage its franchise to own and operate a water supply plant for distributing water as aforesaid. This trust mortgage was made for the purpose of securing a series of 1200 coupon bonds of the Hydraulic Company of the face value of $1,000 each. This trust mortgage was recorded on the 16th day of September, 1886, in the office of the register of deeds for Kent county, Michigan, in Liber 121 of Mortgages, on pages 404 to 411, both inclusive. The Hydraulic Company, within a short time after the execution of said trust mortgage, issued 680 of its coupon bonds so as aforesaid secured by said trust mortgage on its water supply plant and its aforesaid franchises, and sold or pledged them in the open market for valuable consideration to *bona fide* purchasers, in the regular course of business; all of which coupon bonds are now outstanding and unpaid, but legally secured by the aforesaid mortgage, which, also remains in full force and undischarged. These respondents further aver, that the binding obligations contained in such trust mortgage and secured coupon bonds issued years ago, are safe within the protecting arms of the Federal Constitution and out of danger from and beyond the reach of either past or future legislative assaults upon them.

5. These respondents further aver, that the pretended repeal of the perpetual charter of the President and Directors of the
16 Grand Rapids Hydraulic Company by virtue of the two special acts printed in the volume entitled, "Local Acts of Michigan, Session of 1905," the first of which is therein denominated as Act No. 455 and the second as Act No. 492, is ineffective; that neither of said acts pretending to enact that "An act to incorporate the Grand Rapids Hydraulic Company," being Act No. 223 of the Laws of Michigan, 1849, be repealed, did not and could not

affect the right of the respondents to have acted and to still act under the name and style of the President and Directors of the Grand Rapids Hydraulic Company, as a corporation, because they say the aforesaid acts and each of them were and are non-enforceable, unconstitutional and void, and the power reserved to the state of Michigan in said Act No. 223 of the Laws of 1849, incorporating the President and Directors of the Grand Rapids Hydraulic Company, at any time thereafter to *"amend or repeal"* the same, did not give to the legislature of the state of Michigan the right to exercise the arbitrary power used by it in the passage of either of said acts numbered respectively 455 and 492 of the Local Acts of 1905. These respondents claim such acts are non-enforceable, invalid and void for the reasons that:

(*a*) Eeach of said acts is in conflict with § 10 of Article I of the Constitution of the United States, prohibiting the state from passing any law impairing the obligation of contracts.

(*b*) Each of said acts is in conflict with the 14th Amendment of the Constitution of the United States, prohibiting the state from making or enforcing any law depriving any person of property without due process of law.

(*c*) Each of said acts is in conflict with § 16 of Article 16 of the present Constitution of the State of Michigan, providing that a notice shall be given to the President and Directors of the Grand Rapids Hydraulic Company of any proposed alteration in its charter, which notice should have been given according to Act No. 117 of the Laws of 1851.

17 (*d*) Each of the said acts is invalid and in conflict with § 43 of Article 4 of the present Constitution of the State of Michigan, providing that the legislature shall pass no law impairing the obligation of contracts.

(*e*) Each of the said acts is invalid and in conflict with § 32 of Article 6 of the Constitution of this State, prohibiting the taking of private property without due process of law.

(*f*) Each of the said last aforesaid mentioned acts is in conflict with § 2 of Article 18 of the Constitution of this State, providing that no private property can be taken for public use or benefit, unless the necessity of such use and just compensation therefor shall be first ascertained by a jury or commissioners.

(*g*) Each of said acts is invalid in that the legislature of the state of Michigan in passing them, did not in fact, and in good faith, exercise its discretion at all, but on the contrary, acted arbitrarily and unreasonably in passing both of said acts without a hearing and without process.

(*h*) The said acts are void in that they were declared passed without the real assent of two-thirds of the members elected to each house, within the meaning and intent of § 8 of Article 15 of the Constitution of this State.

(*i*) That said acts are void in that they were declared passed without the real assent of a majority of the members present in either house when the votes on said bill were taken upon its aforesaid first and second passage.

(*j*) Each of said acts, according to *the law of the land,* is invalid and non-enforceable at the instance of these relators for the benefit of the City of Grand Rapids. Each of said acts was, as a matter of fact, passed by the legislature of the state of Michigan at the wrongful instance of the City of Grand Rapids for its own selfish and pecuniary advantage, without the President and Directors of the Grand Rapids Hydraulic Company having either reasonable
18 notice or a fair opportunity to be heard on the merits of the bill. The City of Grand Rapids, as a matter of fact, wrongfully induced the legislature to pass each of said acts. It is now attempting by these proceedings to consummate its aforesaid scheme to crush the Hydraulic Company and merge its plant into the public system, thereby attempting to take advantage of its own wrong.

All of which the said John F. Calder, Thomas H. Keogh, John E. More, David A. Crow and Willard Kingsley are ready to verify, as the court shall award, wherefore the said John F. Calder, Thomas H. Keogh, John E. More and Willard Kingsley pray judgment, and that they may be adjudged to be the lawful directors of the President and Directors of the Grand Rapids Hydraulic Company; the said David A. Crow, for himself, prays judgment, and that he may be adjudged to have been a lawful director of the said Hydraulic Company from the time of his aforesaid election as a director until the time when his resignation was accepted, on the 12th day of December, 1906. All of the said respondents, therefore, pray that they may be dismissed and discharged by the court hereof and from the premises above charged to them.

KINGSLEY & WICKS,
Attorneys for Respondents.

Business Address: Grand Rapids, Mich.

JOHN E. MORE,
Of Counsel.

21354. State of Michigan. In the Circuit Court for the County of Kent. The People of the State of Michigan, by the Attorney General, at the relation of George E. Ellis, Moses Taggart and Samuel A. Freshney, plaintiff, vs. John F. Calder, David A. Crow, John E. More, Thomas H. Keogh and Willard Kingsley, respondents. Plea. Kingsley & Wicks, attorneys for respondents. John E. More, of counsel. Received and filed, January 2, 1907, R. A. Mosher, clerk.

19 *Demurrer.*

STATE OF MICHIGAN:

The Circuit Court for the County of Kent.

THE PEOPLE OF THE STATE OF MICHIGAN, by the Attorney General, on the Relation of George E. Ellis, Moses Taggart, and Samuel A. Freshney, Relators,

vs.

JOHN F. CALDER, DAVID A. CROW, JOHN E. MORE, THOMAS H. KEOGH, and WILLARD KINGSLEY, Defendants.

The people of the state of Michigan by its Attorney General now comes into court and says that the plea of the said respondents filed herein is not sufficient in law either in substance or *form*, and for the following special reasons, to-wit:

(1) Said plea contains no statement on the part of respondents of verification or offer of verification as required by the rules of practice.

(2) The allegation in the first paragraph of respondents' plea that David A. Crow subsequent to the filing of said information had resigned his position as a director of the Grand Rapids Hydraulic Company, and disclaiming any right on his part to exercise any function relating to said Hydraulic Company, is not a good and sufficient plea or answer by such respondent, as no respondent can avoid full answer to the charge of the information by resignation nor by the election of a new director in his place.

(3) That the allegation of the second paragraph of respondents' plea as to action of the Grand Rapids Hydraulic Company in the establishing of a water plant and machinery by such company provided, is irrelevant and immaterial to the questions involved, and does not show any right in respondents to act as an incorporated body.

20 (4) The allegation of the second paragraph of said plea is irrelevant, immaterial, superfluous and frivolous and has no proper part or place in a plea to the information in this proceeding.

(5) That the allegations of the first subdivision of the third paragraph of respondents' plea are frivolous and incompetent for any purpose (if true it is not admitted) as must be well known to respondents and their attorneys. That the last subdivision of said third paragraph is of the same character as the first and brings into the so-called plea impertinent, incompetent, irrelevant and frivolous matter absolutely superfluous and valueless as a pleading.

(6) That the bondholders of the Grand Rapids Hydraulic Company are not before the court in this proceeding and cannot properly be made parties thereto, and all allegations in the so-called plea about such bondholders or lienors are improper, superfluous and of no value as a pleading to the information filed herein. That the allegations of what members of the legislature or others said when the legislation in question was offered or enacted, are incompetent

for any purpose and particularly to dispute, modify or change the legislative records.

(7) That all allegations as to what was said, done or thought by Mr. O'Brien, the receiver of the Grand Rapids Hydraulic Company, are incompetent for any and all purposes, and have no proper place or part in the plea made by respondents to the information filed herein.

(8) That the allegation as to the bill offered by Senator Andrew Fyfe April 12, 1905, in the Michigan State Senate and of the passage thereof are incomplete, and relators attach hereto full and complete copies from the legislative records duly certified by the clerks of the House and Senate, and make the same a part of this demurrer and ask that they be considered therewith, and that all matters set out in the third paragraph of respondents' plea, not above specifically pointed out are also frivolous and incompetent for any purpose.

21 (9) That all matters set up in said plea other than those in a direct line of justification or attempted justification of respondents' exercise of the franchise in question and by way of anticipation of relators' answer or reply are improperly embodied therein, and for such reason objectionable.

(10) The allegations of respondents' plea contained in the fourth paragraph thereof as to the mortgage given September 9, 1886, upon the Hydraulic Company's plant and franchise are incompetent, irrelevant and immaterial, and in no sense a defense to the information filed herein or a proper plea or answer to any part thereof. The franchise in question by its express terms was subject to repeal, and any trustee or mortgagee took the same subject to notice and had notice of such reserved right of repeal.

(11) The allegations of the fifth paragraph of respondents' plea are incompetent and insufficient in not showing any right superior to that reserved to the state legislature in the original franchise to repeal said franchise. Such allegations are argumentative and insufficient to change the clear construction of Act No. 223 of the Laws of 1849, or to give respondents any standing thereunder after its repeal.

(12) That said plea is defective both in substance and form by an attempted setting out (but not correctly) of relators' expected reply thereto and averring respondents' erroneous conclusions of law based on such improper and defective averments.

(13) That the allegations of the fifth paragraph of respondents' plea enumerated "*a, b, c, d, e, f, g, h, i* and *j*" are each and every conclusion of law based on acts and alleged facts not shown by the official records of legislative proceedings in connection with the repeal of the Hydraulic Company's charter and have no legitimate part or place in a proper plea to the information filed herein.

(14) The said plea is defective, insufficient and objection-

22 able in all its parts for divers and sundry other reasons.

JOHN E. BIRD.
Attorney General.

MOSES TAGGART,
GANSON TAGGART,
Counsel.

We, the counsel for relators, having the principal charge of this cause in behalf of relators demurring to the plea of respondents, do hereby certify that said demurrer is not interposed for delay and that in our opinion it is well founded.

MOSES TAGGART,
GANSON TAGGART,
Counsel for Relators.

EXHIBIT AA.

I, Charles S. Pierce, clerk of the House of Representatives, hereby certify that the attached sheet of paper contains a correct transcript of all the proceedings of the House of Representatives, at the regular session of the legislature of nineteen hundred five, relative to Senate Bill No. 308, entitled, 'An act to incorporate the Grand Rapids Hydraulic Company,' approved April 2, 1849, and to provide for pre- *Company," approved April 2, 1849, and to provide for pre-* sentation and allowance of claims against the city of Grand Rapids for the value of the tangible property of said company at the time of the approval of this act."

CHARLES S. PIERCE,
Clerk of House of Representatives.

STATE OF MICHIGAN,
House of Representatives:

(From the House Journal, April thirteenth.) Page 924.

A message was received from the Secretary of the Senate
23 informing the House that the Senate had passed and ordered to take immediate effect, the following entitled bill:

Senate bill No. 308.

A bill to repeal Act No. 223 of the Laws of 1849, entitled, "An act to incorporate the Grand Rapids Hydraulic Company," approved April 2, 1849, and to provide for presentation and allowance of claims against the city of Grand Rapids for the value of the tangible property of said company at the time of the approval of this act.

And asking the concurrence of the House in such action.

The bill was read a first and second time by its title, and pending its reference to a committee,

Mr. Ellis moved that Rule 46 be suspended, and that the bill be placed on its immediate passage.

The motion prevailed, two-thirds of all the members present voting therefor.

The bill was then read a third time and passed, two-thirds of all the members elect voting therefore by yeas and nays as follows:

Yeas.

Mr. Adams, R. N.	Mr. Fisher	Mr. McCall	Mr. Scidmore
Agens	Fisk	McCracken	Shook
Austin	Galbraith	McKay	Simpson
Beal	Gordon	Manzelmann	Smith
Benton	Greusel	Marvin	Standard
Bland	Hanlon	Merritt	Stockdale
Bosley	Harris	Ming	Stone
Brockway	Heald	Monroe, J. H.	Stroud
Bunting	Higgins	Monroe, J. S.	Thomas
Byrns	Hudson	Morrice	Tiffany
Canfield	Hunt	Nank	Towner
Clark	Ivory	Nottingham	Turner
Decker	Jerome	Oviatt	Vance
Dewey	Kelley, L. L.	Parker	Van Keuren
Dickinson	Knight, J. B.	Partlow	Walker
24			
Double	Knight, W. A	Pettit	Ward
Duncan	Ladner	Powers	Waters
Dunstan	Lord	Prosser	Watt
Ellis	Lovell	Read	Whelan
Fairbank	McCain	Schantz	Speaker

Nays, none. 80

The title of the bill was agreed to.

Mr. Ellis moved that the bill be given immediate effect.

The motion prevailed, two-thirds of all the members elect voting therefor.

EXHIBIT AA.

I, Elbert V. Chilson, secretary of the Senate of the state of Michigan, hereby certify that the attached sheets of paper contain a true and correct transcript of all of the proceedings of the Senate at the regular sessions of the Legislature of nineteen hundred five, as shown by the official journal relative to Senate Bill No. 308, entitled "A bill to repeal act No. 223 of the Laws of 1849, entitled An act to incorporate the Grand Rapids Hydraulic Company, approved April 2, 1849, and to provide for presentation and allowance of claims against the City of Grand Rapids for the value of the tangible property of said company at the time of the approval of this act."

I further certify that the said sheets of paper contain correct transcript of the bill as it passed the senate and as it was presented to the Governor for his signature.

E. V. CHILSON,
Secretary of Senate.

STATE OF MICHIGAN,
Senate:

(From the Senate Journal, April Eleventh.) Page 715.

25 Mr. Fyfe gave notice that at some future day he would ask leave to introduce,

A bill to repeal an act entitled, "An act to incorporate the Grand Rapids Hydraulic Company," approved April 2, 1849, and to provide for presentation and allowance of claims against the city of Grand Rapids for the value of the tangible property of said company at the time of the approval of this act.

(From the Senate Journal, April twelfth.) Page 745.

Mr. Fyfe, previous notice having been given and leave being granted, introduced

Senate Bill No. 308, entitled

A bill to repeal act No. 223 of the laws of 1849, entitled, "An act to incorporate the Grand Rapids Hydraulic Company," approved April 2, 1849, and to provide for presentation and allowance of claims against the city of Grand Rapids for the value of the tangible property of said company at the time of the approval of this act.

The bill was read a first and second time by its title and pending its reference to a committee,

Mr. Fyfe moved that the rules be suspended, and that the bill be placed upon its immediate passage.

The motion prevailed, two-thirds of all the senators present voting therefor.

The bill was then read a third time and passed, two-thirds of all the senators elect voting therefor by yeas and nays, as follows:

Yeas.

Mr. Ashley	Mr. Doherty	Mr. Jenks	Mr. Peek
Baird	Ely	Jones	Russell
Brown	Farr	Lindsey	Seeley
Cook	Fyfe	MacKay	Sheldon
Cropsey	Glasgow	Martindale	Traver
Curtis	Hayden	Moffatt	Yeomans

Nays, none.

26 The title of the bill was agreed to.

(From the Senate Journal, April Seventeenth.) Page 770.

The following message from the House was also received and read:

HOUSE OF REPRESENTATIVES, *April* 13, 1905.

To the President of the Senate.

SIR: I am instructed by the House to return to the Senate the following bill:

Senate Bill No. 308, entitled,

A bill to repeal act No. 223 of the Laws of 1849, entitled, "An act to incorporate the Grand Rapids Hydraulic Company," approved April 2, 1849, and to provide for presentation and allowance of claims against the city of Grand Rapids for the value of the tangible property of said company at the time of the approval of this act;

And to inform the senate that in the passage of the bill the House has concurred and has also ordered the bill to take immediate effect.

Very respectfully, CHARLES S. PIERCE,
Clerk of the House of Representatives.

The bill was referred to the Secretary for printing and presentation to the Governor.

(From the Senate Journal, April Twenty-sixth.) Page 883.

The following message from the Governor was received and read:

EXECUTIVE OFFICE, LANSING, *April* 25, 1905.

To the President of the Senate.

SIR: I have this day approved, signed and deposited in the office of the Secretary of State

Senat*or* Bill No. 308 (enrolled No. 73), being

An act to repeal act No. 223 of the Laws of 1849, entitled,
27 "An act to incorporate the Grand Rapids Hydraulic Company," and to provide for presentation and allowance of claims against the city of Grand Rapids for the value of the tangible property of said company at the time of the approval of this act.

Very respectfully, FRED M. WARNER, *Governor.*

(Copy of Senate Bill No. 308.)

(No. 492.)

An act to repeal act number two hundred twenty-three of the laws of eighteen hundred forty-nine, entitled, "An act to incorporate the Grand Rapids Hydraulic Co*pm*any," approved April second, eighteen hundred forty-nine, and to provide for presentation and allowance of claims against the city of Grand Rapids for the value of the tangible property of said company at the time of the approval of this act.

The People of the State of Michigan enact:

SECTION 1. Act number two hundred twenty-three of the laws of eighteen hundred forty-nine, entitled, "An act to incorporate the Grand Rapids Hydraulic Company," is hereby repealed, to take effect November first, nineteen hundred five; Provided, that for the purpose of closing up its affairs only it may be continued for one year thereafter.

SECTION 2. The Grand Rapids Hydraulic Company may at any time before January first, nineteen hundred six, and not thereafter,

present a claim to the common council of the city of Grand Rapids for the value of the real and tangible estate owned by it, not including franchise, at the time of the approval of this act, and transfer such property to said city in consideration therefor. If the said company and the said common council shall be unable to agree upon the valuation of said property within thirty days thereafter, then such claim may be filed within the further time of thirty days, in the form of a claim in assumpsit in the Superior Court of Grand
28 Rapids, and issue framed thereon in the nature of assumpsit. The rules and practice in suits of assumpsit shall be applicable thereto. Either party to such issue may take the same for review to the Supreme Court of the state, upon questions of law raised upon the trial, or charge of the court made to a jury, if the same shall be tried before a jury. The amount finally awarded to said company against the city of Grand Rapids shall be a claim against the city to be paid in the same manner as other claims: Provided, That if the said Hydraulic Company shall not elect to present a claim against the said city and transfer its property to said city, it may, upon giving a bond with sufficient sureties to be approved by the common council to protect the city from any damages caused thereby, remove all its tangible property from the streets, lands and alleys in said city, under the direction of the board of public works of said city, and in the event of any disturbance of the street or alley grades, or injury thereto, caused by said removal, it shall at the time of removal of its property therefrom cause the said streets, lands and alleys to be repaired and placed in as good condition as before.

Approved April 25, 1905.

21354. State of Michigan. The Circuit Court for the County of Kent. Attorney General, relator, vs. John F. Calder, et al., respondents. Demurrer to plea. Received and Filed January 18, 1907, Alex E. Krakowski, deputy clerk.

29 *Joinder in Demurrer.*

STATE OF MICHIGAN:

In the Circuit Court for the County of Kent.

THE PEOPLE OF THE STATE OF MICHIGAN, by the Attorney General, at the Relation of George E. Ellis, Moses Taggart, and Samuel A. Freshney, Plaintiff,

vs.

JOHN F. CALDER, DAVID A. CROW, JOHN E. MORE, THOMAS H. KEOGH, and WILLARD KINGSLEY, Respondents.

And the said respondents say that their said plea and the matters therein contained, in substance and form as the same are therein stated and set forth, are sufficient in law in this aforesaid action against the said respondents, who are now ready to verify and prove

the same as this court shall direct and award; wherefore, inasmuch as the plaintiff and relators have not filed a replication to the said plea of the respondents, nor hereto in any manner denied the same, the said respondents pray that a judgment may be rendered in favor of the respondents, overruling the demurrer and declaring the said John F. Calder, John E. More, Thomas H. Keogh and Willard Kingsley to be entitled to the office of Directors of the Grand Rapids Hydraulic Company.

KINGSLEY & WICKS,
Attorneys for Respondents.

JOHN E. MORE,
Of Counsel..

21354. State of Michigan. In the Circuit Court for the County of Kent. The People of the State of Michigan, by the Attorney General, at the relation of George E. Ellis, Moses Taggart and Samuel A. Freshney, plaintiff-, vs. John F. Calder, David A. Crow, John
30 E. More, Thomas H. Keogh and Willard Kingsley, respondents. Joinder in demurrer. Kingsley & Wicks, attorneys for respondents, John E. More, of counsel. Received and Filed January 19, 1907, Robert G. Hill, deputy clerk.

Opinion of Judge.

(See Bill of Exceptions, Exhibit A.)

21354. John E. Bird, Att'y General, ex rel. relator, vs. John F. Calder, et al., respondents. Memorandum of opinion. Received and Filed, April 22, 1907. Robert G. Hill, deputy clerk.

Final Judgment.

(Journal "X2," page 50.)

At a General Term of the Circuit Court for the County of Kent, Continued and Held in the Court House, in the City of Grand Rapids, in said County, on Monday, April 22nd, 1907.

Present, Hon. Willis B. Perkins, Circuit Judge.
The court was opened for business in due form.

JOHN E. BIRD, Attorney General, on Relation of GEORGE E. ELLIS, MOSES TAGGART, and SAMUEL A. FRESHNEY, Relators,

vs.

JOHN F. CALDER, DAVID A. CROW, JOHN E. MORE, THOMAS H. KEOGH, and WILLARD KINGSLEY, Respondents.

The above entitled cause having been brought on for hearing and argument on the demurrer of the Attorney General of the State of Michigan to the plea of respondents, and a full argument and hearing thereon having been had, and it appearing to the court
31 from the pleadings that the act of the state legislature of 1849 incorporating the Grand Rapids Hydraulic Company was re-

pealed by the act of the state legislature of 1905, and that the respondents, John F. Calder, David A. Crowe, John E. More, Thomas H. Keogh and Willard Kingsley subsequent to the repeal of the act incorporating the said Grand Rapids Hydraulic Company and at the time of the institution of this proceeding at, to-wit, the City of Grand Rapids, Kent county, Michigan, without then and there being legally incorporated, under the name and style of the Grand Rapids Hydraulic Company and in contempt of the people of the state of Michigan and to their damage and prejudice, assumed to act and did act as a body corporate and exercise corporate rights, franchises and privileges without authority of law;

It is therefore considered and adjudged that the demurrer to respondents' plea be sustained and that the respondents have no authority in law to act as a body corporate or exercise the rights, privileges and franchises of a body corporate, and that said respondents be and they hereby are altogether excluded, ousted and prohibited from exercising or assuming to exercise corporate rights, privileges or franchises, or acting or assuming to act as a body corporate, and particularly under the name and style of the Grand Rapids Hydraulic Company.

It is further ordered that said relators recover costs against said respondents to be taxed.

In above cause, upon application of counsel for respondents:

It is ordered, that all proceedings, except the taxation of costs, be and the same is hereby stayed for the period of twenty days, to enable said counsel to take such steps in the premises as may be advised.

The court here adjourned until tomorrow morning at nine o'clock.

32 Read, approved and signed in open court.

WILLIS B. PERKINS,
Circuit Judge.

Order Correcting Date of Final Judgment.

At a General Term of the Circuit Court for the County of Kent, Continued and Held in the Court House, in the City of Grand Rapids, in the said County, on Monday, May 20, 1907.

Present, Hon. Willis B. Perkins, Circuit Judge.

The court was opened for business in due form.

21354.

THE PEOPLE OF THE STATE OF MICHIGAN, by the Attorney General, at the Relation of George E. Ellis, Moses Taggart, and Samuel A. Freshney, Plaintiff,

vs.

JOHN F. CALDER, DAVID A. CROW, JOHN E. MORE, THOMAS H. KEOGH, and WILLARD KINGSLEY, Respondents.

It appearing in this cause, that the order sustaining the demurrer to the respondents' plea was made on April 22nd, 1907, and it further

appearing that the final order and the final judgment in this cause were actually made and rendered on May 7th, 1907, but, by misapprehension, said final judgment of May 7th, 1907, was entered on the records of this court as of April 22nd, 1907;

It is therefore ordered, that the records of the court be corrected in accordance with these facts, and that the final order and judgment of this court in this cause, be recorded and entered as made on May 7th, 1907.

And it is ordered, in the above entitled cause, upon the filing of a bond, that time heretofore granted to settle bill of exceptions,
33 move for new trial or to take such other steps in the premises as may be a-visable be and same is hereby extended sixty days from and after May 12, 1907.

Read, approved and signed in open court.

WILLIS B. PERKINS,
Circuit Judge.

Respondents' Written Exceptions to Order Sustaining Demurrer and Entry of Final Judgment.

STATE OF MICHIGAN:

In the Circuit Court for the County of Kent.

THE PEOPLE OF THE STATE OF MICHIGAN, by the Attorney General, at the Relation of George E. Ellis, Moses Taggart, and Samuel A. Freshney, Plaintiff,

vs.

JOHN F. CALDER, DAVID A. CROW, JOHN E. MORE, THOMAS H. KEOGH, and WILLARD KINGSLEY, Respondents.

The said respondents, by their counsel, hereby except:

First, to the rulings, orders and judgment of said court sustaining the demurrer to the respondents' plea, for the reason that the said plea shows sufficient authority in law for the respondents to act under the name and style of the Grand Rapids Hydraulic Company, as a corporation in this State.

Secordly, the said respondents, by their said counsel, further except to the making and rendering of said final judgment of ouster against them, by said court, for the reason, that the said plea, in law, showed an existing charter and sufficient authority for the respondents to act as lawful directors, under the name and style of the Grand Rapids Hydraulic Company, as a corporation within this state.

34 Thirdly, the said respondents by their said counsel, also further except to the rulings and judgment of said court in sustaining said demurrer, and in making and rendering said final judgment of ouster, against them, for the reason that Act No. 455, and Act No. 492, of Local Acts of Michigan, session 1905, are both void and neither of them are enforceable against said respondents in these proceedings.

Dated, May 7th, 1907.

KINGSLEY & WICKS,
Attorneys for Respondents.

JOHN E. MORE,
Of Counsel.

21354. State of Michigan. In the Circuit Court for the County of Kent. The People of the State of Michigan by the Attorney General, at the relation of George E. Ellis, Moses Taggart and Samuel A. Freshney, plaintiff, vs. John F. Calder, David A. Crow, John E. More, Thomas H. Keogh and Willard Kingsley, respondents. Respondents' exceptions to order sustaining demurrer and final judgment. Kingsley & Wicks, attorneys for respondents. John E. More, of counsel. Received and filed, May 7, 1907. Alex E. Krakowski, deputy clerk.

Bond Staying Proceedings.

Know all men by these presents, that we, John F. Calder, David A. Crow, John E. More, Thomas H. Keogh and Willard Kingsley, of Grand Rapids, Michigan, as principals, and the American Surety Company of New York, New York City, New York, as surety, are held and firmly bound unto The People of the State of Michigan, in the penal sum of five hundred dollars ($500.00), lawful money of the United States, for the payment of which well and truly to be made we bind ourselves, our, and each of our heirs, executors, administrators and successors, firmly by these presents.

Dated, May 20, A. D., 1907.

Whereas, in a certain cause pending in the Circuit Court for the county of Kent, state of Michigan, wherein The People of the State of Michigan, by the Attorney General, at the relation of George E. Ellis, Moses Taggart and Samuel Freshney, is plaintiff, and the above bounden John F. Calder, David A. Crow, John E. More, Thomas H. Keogh and Willard Kingsley, are respondents, a judgment was rendered in *quo warranto* proceedings, on or about the 7th day of May, A. D. 1907, in favor of the said plaintiff and against the said respondents, sustaining the demurrer to the respondents' plea in said cause, and ordering and adjudging that the respondents had no authority in law to act as a body corporate, or exercise the rights, privileges and franchises of a body corporate, and that said respondents be altogether excluded, ousted and prohibited from exercising or assuming to exercise corporate rights, privileges or franchises, or acting or assuming to act as a body corporate, and particularly under the name and style of the Grand Rapids Hydraulic Company, and for costs against said respondents to be taxed; and whereas, the above bounden respondents have applied for a stay of proceedings upon said judgment for the purpose of settling a bill of exceptions in said cause:

Now therefore, the condition of this obligation is such, that if the above bounden, John F. Calder, David A. Crow, John E. More, Thomas H. Keogh and Willard Kingsley, respondents in said cause, shall abide by, pay and satisfy said judgment, if the same is not set aside or reversed, and if a writ of error is issued in said cause, shall prosecute their said writ of error to effect, and shall abide by, pay and

satisfy such judgment as shall be rendered against them
36 thereon, then this obligation to be void; otherwise in full force.

JOHN F. CALDER. [L. S.]
DAVID A. CROW, [L. S.]
By WILLARD KINGSLEY, *Attorney in Fact.*
JOHN E. MORE. [L. S.]
THOMAS H. KEOGH. [L. S.]
WILLARD KINGSLEY. [L. S.]
THE AMERICAN SURETY COMPANY OF NEW YORK,
By HERBERT N. MORRILL,
Resident V. President,
By A. E. EWING, *Resident Ass't Secretary.*

Signed, sealed and delivered in presence of,

B. J. BURKE,
J. H. QUIGG,
Witness to John F. Calder.
KIRK E. WICKS,
DAVID A. WARNER,
Witnesses to David A. Crow, John E. More, Thomas H. Keogh, and Willard Kingsley.

No. 21354. The Circuit Court for the County of Kent. John E. Bird, Attorney General, et al., plaintiff, vs. John F. Calder, et al., respondents. Bond staying proceedings. Filed May 20, 1907. Frank D. McKay, deputy clerk. Ent. Mis. B. 2 pp. 590.

Notice of Settlement of Bill of Exceptions and Proof of Service.

STATE OF MICHIGAN:

In the Circuit Court for the County of Kent.

THE PEOPLE OF THE STATE OF MICHIGAN, by the Attorney General, at the Relation of George E. Ellis, Moses Taggart and Samuel A. Freshney, Plaintiff,

vs.

JOHN F. CALDER, DAVID A. CROW, JOHN E. MORE, THOMAS H. KEOGH, and WILLARD KINGSLEY, Respondents.

To Hon. John E. Bird, Attorney General:

Please take notice, that a bill of exceptions in this cause will be settled by the Hon. Willis B. Perkins, Circuit Judge, at his chambers in the court house at Grand Rapids, in said county, on the 24th day of June, 1907, at 9:00 o'clock a. m.

You will further take notice, that the annexed is a true copy of the said bill of exceptions, as prepared by the attorneys for the re-

spondents, for settlement by the circuit judge, together with a copy of respondents' assignments of error.

Dated, June 18, 1907.

KINGSLEY & WICKS,
Attorneys for Respondents.

JOHN E. MORE,
Of Counsel.

37 STATE OF MICHIGAN:

In the Circuit Court for the County of Kent.

THE PEOPLE OF THE STATE OF MICHIGAN, by the Attorney General, at the Relation of George E. Ellis, Moses Taggart and Samuel A. Freshney, Plaintiff,

vs.

JOHN F. CALDER, DAVID A. CROW, JOHN E. MORE, THOMAS H. KEOGH, and WILLARD KINGSLEY, Respondents.

STATE OF MICHIGAN,
County of Kent, ss:

I, Kirk E. Wicks, of said county and state, being duly sworn say that I am a member of the firm of Kingsley & Wicks, attorneys for the respondents in the above entitled cause; that on the 18th day of June, 1907, I served a notice, of which the foregoing and annexed is a true copy, together with a copy of the proposed bill of exceptions and respondents' assignments of error in this cause, on Messrs. Taggart & Taggart, counsel for the above named plaintiff, by personally delivering said documents to Mr. Moses Taggart, one of the members of said firm, at his office in the city of Grand Rapids, Michigan.

KIRK E. WICKS.

Subscribed and sworn to before me, this 20th day of June, 1907.

DAVID A. WARNER,
Notary Public, Kent County, Michigan.

My commission expires October 16, 1910.

38 STATE OF MICHIGAN:

In the Circuit Court for the County of Kent.

THE PEOPLE OF THE STATE OF MICHIGAN, by the Attorney General, at the Relation of George E. Ellis, Moses Taggart and Samuel A. Freshney, Plaintiff,

vs.

JOHN F. CALDER, DAVID A. CROW, JOHN E. MORE, THOMAS H. KEOGH, and WILLARD KINGSLEY, Respondents.

STATE OF MICHIGAN,
County of Kent, ss:

I, Herman A. Vander Noot, of said county and state, being duly sworn, say that I am clerk in the office of Kingsley & Wicks, attor-

neys for the respondents, in the above entitled cause; that on the 18th day of June, 1907, I served notice, of which the foregoing and annexed is a true copy, together with a copy of the proposed bill of exceptions and the respondents' assignments of error in this cause, on Hon. John E. Bird, attorney for the above plaintiff, by enclosing said documents in an envelope, duly sealed, and the postage thereon fully prepaid, and depositing the same in the postoffice in Grand Rapids, Michigan, and addressed to Hon. John E. Bird, Attorney General, Lansing, Michigan, that being his postoffice address according to my best information and belief.

HERMAN A. VANDER NOOT.

Subscribed and sworn to before me, this 20th day of June, 1907.

DAVID A. WARNER,
Notary Public, Kent County, Michigan.

My commission expires October 16, 1910.

State of Michigan.
Attorney General's Office.
Lansing.

John E. Bird, Attorney General.
Henry E. Chase, Deputy Attorney General.

JUNE 19, 1907.

Messrs. Kingsley & Wicks, Attorneys at Law, Grand Rapids, Michigan.

GENTLEMAN: Yours of the 18th instant, with copy of the proposed bill of exceptions and respondents' assignments of error, in The People, etc., vs. John F. Calder, et al., received.

Yours respectfully,

HENRY CHASE,
Deputy Attorney General.

C-g.

21354. State of Michigan. In the Circuit Court for the County of Kent. The People of the State of Michigan, etc., plaintiff, vs. John F. Calder, et al., respondents. Proof of service of notice of settlement of bill of exceptions. Kingsley & Wicks, attorneys for respondents. John E. More, of counsel. Received and filed, June 23, 1907. Louis H. Dolan, deputy clerk.

39 *Bill of Exceptions.*

STATE OF MICHIGAN:

In the Circuit Court for the County of Kent.

THE PEOPLE OF THE STATE OF MICHIGAN, by the Attorney General, at the Relation of George E. Ellis, Moses Taggart, and Samuel A. Freshney, Plaintiff,

vs.

JOHN F. CALDER, DAVID A. CROW, JOHN E. MORE, THOMAS H. KEOGH, and WILLARD KINGSLEY, Respondents.

The issue joined between the parties to this cause, came on regularly to be heard on the 18th day of March, 1907, before Hon. Willis B. Perkins, one of the judges of said Circuit Court, on an issue of law, framed by an information in the nature of *quo warranto*, filed by the plaintiff against these respondents in this cause, the respondents' plea thereto, and the plaintiff's demurrer to such plea, to which the respondents joined. Messrs. Moses Taggart and Ganson Taggart appearing as counsel for the plaintiff, and Messrs. Kingsley & Wicks and John E. More, Esq., appearing as counsel for the respondents.

Thereupon, the issue of law, so joined as aforesaid, was argued by counsel for the respective parties, before said court, on the 18th day of March, on the 25th day of March, and on the 1st day of April, 1907, and submitted to the court. Said cause was taken under advisement by said court, but no decision made or judgment rendered thereon until afterwards, to-wit, on the 22nd day of April, 1907, at which time the said court rendered its opinion and decision in writing, and sustained the said demurrer to the aforesaid plea of the respondents, to which ruling, and decision of the court, sustaining said demurrer, counsel for said respondents did then
40 and there except. A copy of which opinion and decision is hereto annexed and marked "Exhibit A" and made a part of this bill of exceptions.

Thereafter, and on the 7th day of May, 1907, said court, on motion of counsel for the plaintiff, made and rendered a final judgment, in said cause, in favor of said plaintiff, and against the said respondents, sustaining plaintiff's demurrer to the aforesaid plea of respondents, and ordering and adjudging, that the respondents did not have authority in law to act as a body corporate or exercise the rights, privileges and franchises of a body corporate, and that said respondents be altogether excluded, ousted and prohibited from exercising or assuming to exercise corporate rights, privileges or franchises, or acting or assuming to act as a body corporate and particularly under the name and style of the Grand Rapids Hydraulic Company, and for costs against said respondents to be taxed, the plaintiff to have execution therefor, to which decision of said court, in making and rendering said final judgment for the plaintiff, said

counsel for the respondents did, on behalf of said respondents, then and there except.

Counsel for respondents, did, also in behalf of the said respondents, allege exceptions in writing, and file the same with the clerk of the said court.

And thereafter, said judge of said court, at the request of counsel for the respondents, after due notice to the adverse party, the counsel of record for said plaintiff appearing at the time of its settlement, has signed this bill of exceptions, this 28th day of June, A. D. 1907.

WILLIS B. PERKINS,
Circuit Judge.

41 EXHIBIT A.

STATE OF MICHIGAN:

In the Circuit Court for the County of Kent.

JOHN E. BIRD, Attorney General, ex Rel., etc., Relators,
vs.
JOHN F. CALDER et al., Respondents.

Memorandum of Opinion.

The information filed in this cause alleges, in substance, that the respondents are assuming to act under the name and style of the Grand Rapids Hydraulic Company as a corporation at the city of Grand Rapids, Michigan, without being a legal corporation, and prays that the respondents show by what warrant they claim to act as a corporation.

The respondents' answer alleges:

(1) That for fifty-seven years under an act of 1849 the Grand Rapids Hydraulic Company has been in existence; that the president and directors are a corporation and were elected within the last year; that they are acting rightfully under the present name and style of the Directors of the Hydraulic Company; that David A. Crow ceased to act as such director on the 12th day of December last; that James R. Fitzpatrick took his place. It alleges that the Hydraulic Company was authorized to supply water from springs to the city.

(2) That the city has exercised its authority to extend a municipal system of water works, and that the two are competitors, and refers to the suit instituted by the city, reported in 66 Mich., 606.

(3) That an effort was made in the spring of 1905 on the part of the city to crush the Hydraulic Company and take away its franchise by legislative action, without due process of law and without a hearing; that this was done for the benefit of the mu-
42 nicipal treasury and to merge the plant of the company into the public system without just compensation.

(4) That the communication of the Mayor of the city to the Common Council in March, 1905, recommended the legislature to

repeal the Hydraulic Company charter, naming the alleged conspirators, and the directing copies of the bill for repeal to be furnished to the representatives of Kent county, which was done; that Representative Ellis and Senator Fyfe were requested to introduce such bill and cause it to be passed without notice to the company; that this constituted a proceeding on the part of the city; that the proposed bill was introduced on the 28th day of March without notice to the Hydraulic Company, and was passed.

(5) That the Hydraulic Company learned that a bill to repeal its charter had been introduced in the legislature; that some of its officers went to Lansing and had an interview with Representative Ellis and Senator Fyfe protesting against the passage of the bill, and requested them to afford the Hydraulic Company an opportunity to be heard on the merits of the bill; that such request was ignored; that the bill was passed by a unanimous consent of the House; that on the same day the same bill was passed in the Senate; that it was customary in the legislature when the members from a district are a unit on pending measure affecting their district for the other members of the legislature to vote for such measure at the request of the members from such local district.

(6) That the passage of the bill was brought about by the statements and representations made by Representative Ellis and Senator Fyfe that it did not involve a subject in which the people of the state of Michigan were interested. It is alleged that the charter was not in its nature a local matter, but a valid and legal contract between the state as one party and the Hydraulic Company
43 as the other; that the members of the legislature outside of those from Kent county relied on the statements and representations from members of the District of Kent county that it was local, and voted for the bill without exercising their judgment and discretion on its merits.

(7) That on April 5th T. J. O'Brien, Receiver of the Hydraulic Company, Alfred C. Sekell and Thomas H. Keogh, representing the stockholders and bondholders, appeared at the Governor's room at the capitol building and protested against the approval of the bill; that the same was passed without notice to the Hydraulic Company; that the Mayor of the city, City Attorney and Mr. Brown, a member of the Board of Public Works, represented that it was legal under the reserved power of the legislature to repeal the charter of the Hydraulic Company, and urged the Governor to approve the bill, which he then did; that the only opportunity the Hydraulic Company or its officers had for a hearing on the bill was that of April 5, 1905; that the motion of Representative Ellis that the bill be passed was premature and contrary to parliamentary law; that on the 12th of April Senator Fyfe, previous notice being given under the rule, re-introduced the identical bill, and that it was read a first and second time by its title; that Senator Fyfe moved a suspension of the rules that the bill might be placed on its immediate passage, which motion prevailed; that two-thirds of all the senators elect voted therefor.

(8) That on the following day the bill was received in the House with a message from the secretary of the Senate informing the House that the Senate had passed the bill and ordered the same to take im-

mediate effect, and, thereupon, the same was read a first and second time by its title, and, pending reference to a committee, Representative Ellis moved that rule 46 be suspended and the bill placed on its passage, which motion prevailed; that the bill was read a third time and passed by a two-thirds vote of the House.

44 (9) That the last passage of the bill was introduced by the reliance of the legislature upon the usage and custom relating to local measures and by the same statements and representations as before made by Representative Ellis and Senator Fyfe, which representations were that it was a local measure, whereas it was a bill involving a subject of general public interest, and intended to revoke an express legal contract.

(10) That the second and last passage of the bill did not receive the real assent of a majority of the members of each house who voted thereon, although they voted yea; that the legislature, in compliance with the aforesaid custom relating to local measures, and in reliance upon the aforesaid representations and special request of members from Kent county, voted therefor; that on the 20th day of April said bill so re-passed by the legislature was again presented to the Governor, and by him approved on the 25th day of April, 1905, becoming Act 492 of the Local Acts of 1905; that the Hydraulic Company or its officers had no notice of the contemplated re-introduction and re-passage of the bill.

(11) That the three relators are officers of the city, Mayor, City Attorney and General Manager of the Board of Public Works, and authorized to carry into consummation the designed plan and avowed purpose to put the Hydraulic Company out of business and merge its plant into the city's system; that they induced the Attorney General to institute this proceeding on the ground that it was a subject in which the people of the state of Michigan were interested and not a local measure.

(12) That in order to extend its system and conduct its business the Hydraulic Company in 1886 delivered to the American Loan and Trust Company a valid mortgage on its plant and tangible property and its franchise to own and operate such a plant; that this mortgage was to secure twelve hundred coupon bonds of one thousand

45 dollars each; that the Hydraulic Company issued six hundred and eighty of its coupon bonds and sold them for a consideration not stated, which coupon bonds are outstanding and unpaid, but are legally secured by said mortgage; that the obligations contained in such trust mortgage issued as aforesaid "are safe within the protecting arms of the federal constitution and out of danger from and beyond the reach of either past or future legislative assaults upon them."

(13) That the pretended repeal of the charter of the present directors of the Hydraulic Company is ineffective and does not affect an act entitled "An Act to incorporate the Grand Rapids Hydraulic Company, being Act 223 of the laws of Michigan, 1849," and did not repeal or affect the right of the respondents to have acted and still act under the style of the directors of the Grand Rapids Hydraulic Company as a corporation, because such act is non-enforcible, unconstitutional and void; that the reserved right to "amend or repeal" the

law of 1849 did not give to the legislature of the state the right to exercise arbitrarily the power used by it in the passage of either of said acts; that such acts are not enforcible.

(14) That such acts are void because

(*a*) They are in conflict with section 10 of article 1 of the constitution of the United States which prohibits the impairing of the obligation of contracts.

(*b*) They are in conflict with the Fourteenth Amendment of the constitution prohibiting the taking of property without due process of law.

(*c*) They are in conflict with section 16 of article 15 of the present state constitution that notice shall be given to the present directors of any proposed alteration of its charter, which notice should have been given according to Act No. 117 of the laws of 1851.

(*d*) They are in conflict with section 43 of article 4 of the
46 state constitution prohibiting the impairment of the obligation of contracts.

(*e*) They are invalid and in conflict with section 32 of article 6 of the state constitution prohibiting the taking of private property without due process of law.

(*f*) They conflict with section 2 of article 18 of the constitution of the state providing that private property cannot be taken for public uses or benefit unless the necessity is determined by a jury.

(*g*) They are invalid in that the legislature in passing them did not in good faith exercise its discretion at all, but acted arbitrarily and unreasonably without a hearing and without process.

(*h*) They are void in that they were declared passed without the real assent of two-thirds of the members elect to each house.

(*i*) They are, according to the law of the land, invalid and non-enforcible at the instance of relators for the benefit of the city of Grand Rapids; that they were passed at the wrongful instance of the city of Grand Rapids for its selfish and pecuniary advantage, without the president and directors of the Hydraulic Company having reasonable notice thereof, or opportunity to be heard; that the city of Grand Rapids wrongfully induced the legislature to pass said acts, and is now attempting by these proceedings to consummate its scheme to crush the Hydraulic Company and merge its plant into the public system.

The respondents pray that it may be adjudged that they are the lawful directors, etc.

Relators demur to said answer for the reasons:

(1) That David A. Crow subsequent to the filing of the information resigned his position as director, and disclaimed the right to exercise any function, for the reason that no respondent can avoid
full answer to the charge of the information.

47 (2) That the allegation of the second paragraph of respondents' plea as to the action of the Hydraulic Company in establishing a water plant, machinery, etc., is irrelevant and immaterial to the questions involved.

(3) That the allegation of the second paragraph is immaterial, superflous and frivolous and has no proper part or place in a pleading.

(4) That the allegations of the first subdivision of the third paragraph are superfluous and incompetent for any purpose, and that the last subdivision of the third paragraph is of the same character as the first, improper, incompetent, immaterial, irrelevant, superfluous and frivolous.

(5) That the bondholders of the Grand Rapids Hydraulic Company are not before the court and cannot be made parties thereto; that all allegations relating thereto are improper and superfluous; that the allegations of what members of the legislature or others said, when the legislation in question was offered, are incompetent for any purpose, and particularly, to dispute, modify or change the legislative journals.

(6) That what was said or done by O'Brien, the Receiver, is immaterial and incompetent, and has no proper place in the answer.

(7) That the allegations as to the bill offered by Senator Fyfe are incomplete, and relators attach thereto full and complete copies from the legislative journals duly certified by the clerks of the House and Senate, and make the same a part of the demurrer, and ask that they be considered; that the matter set up in the third paragraph of respondents' plea is superfluous and incompetent.

(8) That all matters set up in the plea or answer other than those in direct line of justification or attempted justification in anticipation of relators' answer are improperly embodied therein, and for such reason objectionable.

(9) That the allegations of respondents' plea contained
48 in the fourth paragraph as to the mortgage given September 9, 1886, are irrelevant, immaterial and incompetent, and no defense to the information filed, as the franchise by its express terms was subject to repeal, and any trustee or mortgagee took the same subject to notice of such reserved right.

(10) The allegations of the fifth paragraph of respondents' plea are incompetent and insufficient in not showing any right superior to that reserved to the state legislature in the original franchise to repeal such franchise; that such allegations are argumentative and insufficient to change the clear construction of Act 223 of the laws of 1849.

(11) That the plea is defective in substance and form by the attempted setting up of relators' expected reply thereto and averring respondents' erroneous conclusions of law based on such improper and defective averments.

(12) That the allegations of the fifth paragraph of respondents' plea enumerated by letters "*a*" to "*j*" are each and every conclusion of law based on alleged facts not shown by official records of legislative proceedings in connection with the repeal of the Hydraulic Company's charter, and have no legitimate part or place in a proper plea to the information filed.

(13) That the said plea is defective and insufficient in all of its parts for divers and sundry other reasons.

To the demurrer is attached copies of the proceedings relating to the passage of the last repealing bill duly certified by the Secretary of the Senate and Clerk of the House.

The points thus raised by the respondents' answer and the demurrer thereto may be summarized as follows:

(1) The constitutionality of the repealing act of 1905;

(2) The sufficiency of the notice to respondent of an intent to repeal the act of 1849;

(3) Is it permissible to go behind the records of the legislature and inquire into the motives of that body in passing the repealing act of 1905?

49 The constitutionality of the act is specifically raised by subdivision *a*, *b*, *d*, *e*, and *f* of paragraph 14 of the answer, the sufficiency of the notice by subdivision *c*, and the right to go behind the legislative records by subdivision *g*, *h* and *i* of the same paragraph.

I.

I am satisfied that the reservation of the right to amend or repeal contained in the Act of 1849 gave to the legislature the undoubted authority to exercise that right at any time therafter it saw fit. If this is so, it must follow as a logical sequence, that no provision of either the state or federal constitution can be violated by a proper exercise of this right. Both the respondent company and all other persons interested therein, whether stockholders or otherwise, are conclusively bound by the provisions of the Act of 1849, and, having accepted the benefits and privileges bestowed by it, are now estopped from denying the right of the legislature to exercise the authority therein expressly reserved. While the power to alter or amend may not bestow any authority to take away corporate rights which may have become vested under the rights and privileges already granted, still the right to incorporate is not such a property right as may not be withdrawn under a reservation in the act itself to that effect. Such withdrawal may affect incidentally the otherwise vested rights of the company, but it cannot be treated either as an impairment of the obligation of a contract or the taking of property without due process of law under the constitutional prohibitions referred to.

The rights of the stockholders to the tangible property of the company and rights of the bondholders to their security are, therefore, unaffected by this proceeding, except as they may be incidentally affected by the forfeiture of the company's charter.

50 II.

No authority has been called to my attention which holds that any other or different notice than the ordinary notice for the presentation and passage of bills by the legislature was required in this case. It is conceded that such usual notice was given, and I think it was sufficient.

III.

The general rule is that unless the legislative journals affirmatively show that the constitutional requirements with reference to the passage of any act were not complied with, the act must stand. The

presumption is conclusive, unless the fact affirmatively appears to the contrary, that all requirements necessary to make the act legal have been complied with. The journal is the only authority the court can consider. But is it urged that a different rule should be applied in this case. The repeal of this act was clearly within the legislative authority, and I do not think it competent to go behind the records of the journal to inquire into the motives of that body in passing the act in question. I am unable to see in this case the distinction sought to be made by respondents' counsel between the legislature as a law-making and as a contract-making body. The rules governing the conclusiveness and legality of its acts are, in my judgment, the same in both cases.

Other questions incidental to the principal questions involved were discussed by counsel in their briefs and at the argument, but I think the determination of the three points as indicated must determine this controversy and lead to the sustaining of the demurrer filed to the answer herein.

Let an order be entered to this effect.

WILLIS B. PERKINS,
Circuit Judge.

21354. State of Michigan. In the Circuit Court for the County of Kent. People of the State of Michigan, etc., plaintiff, vs. John F. Calder, et al., respondents. Bill of exceptions. Kingsley & Wicks, attorneys for respondents. John E. More, of counsel. Received and filed, June 23, 1907. Louis H. Dolan, deputy clerk.

51 *Assignments of Error.*

STATE OF MICHIGAN:

The Circuit Court for the County of Kent.

THE PEOPLE OF THE STATE OF MICHIGAN, by the Attorney General, at the Relation of George E. Ellis, Moses Taggart, and Samuel A. Freshney, Plaintiff-,

vs.

JOHN F. CALDER, DAVID A. CROW, JOHN E. MORE, THOMAS H. KEOGH, and WILLARD KINGSLEY, Respondents.

Now come the respondents, John F. Calder, David A. Crow, John E. More, Thomas H. Keogh and Willard Kingsley, by Kingsley & Wicks, their attorneys, and say that in the record and proceedings in the above entitled cause, there is manifest error in the following particulars:

First. That by the record aforesaid it appears that the demurrer of the plaintiff to the respondents' plea in form aforesaid was sustained by the said court, whereas the said demurrer ought to have been overruled by said court, for the reason, that said plea of the said respondents showed that they had full authority, in law, to act as a body corporate, and to exercise the rights, privileges and fran-

chises, of a body corporate, under the name and style of the Grand Rapids Hydraulic Company, as stated in their said plea.

Second. There is also error in this, to-wit, that by the record aforesaid it appears the aforesaid plea of the respondents was,
52 according to the prescribed rules and established practice of the courts of this state, in *quo warranto* proceedings, in good and proper form, but such plea, if defective in form, still set forth a legal justification of all the acts of the respondents, and showed that the said Hydraulic Company was still an existing corporation, and the Circuit Judge, according to the record aforesaid, and the written opinion sustaining the said demurrer, ruled, passed upon and decided the real merits of the issue raised by the pleadings, and the said Circuit Judge erred in sustaining said demurrer generally, and rendering a final judgment of ouster against said respondents, even if said plea was defective in form merely.

Third. There is also error in this, to-wit, that by the record aforesaid and the aforesaid written opinion of the Circuit Judge, sustaining the said demurrer, said Circuit Judge ruled and held, among other things, that it was not "competent to go behind the records of the journals to inquire into the motives of that body in passing the act in question. I am unable to see, in this case, the distinction sought to be made by the respondents' counsel, between the legislature as a law-making and as a contract-making body. The rules governing the conclusiveness and legality of its acts are, in my judgment, the same in both cases."

Fourth. There is also error in this, to-wit, that by the record aforesaid, it appears the said Circuit Judge, in sustaining said demurrer, and rendering the aforesaid judgment of ouster against said respondents, ruled and held that the legislature had the arbitrary power and authority to pass the so-called repealing acts, No. 455 and 492, of the Local Acts of 1905, at its pleasure without notice to the said Grand Rapids Hydraulic Company and without giving said corporation any opportunity to be heard before the legislature.

Fifth. There is also error in this, to-wit, that by the record aforesaid, and by the written opinion of the said Circuit Judge, in sustaining the said demurrer, it appears that the said Circuit
53 Judge, among other things, ruled and held that "no authority has been called to my attention, which holds that any other or different notice, than the ordinary notice for the presentation and passage of bills by the legislature was required in this case."

Sixth. There is also error in this, to-wit, that by the record aforesaid, it appears the said Circuit Judge, among other things, ruled and held that the legislature had the arbitrary power, under the reservation clause contained in the act of 1849, incorporating the Grand Rapids Hydraulic Company, to repeal its charter at pleasure, and "that the reservation of the right to amend or repeal contained in the Act of 1849, gave to the legislature the undoubted authority to exercise that right at any time thereafter it saw fit."

Seventh. There is also error in this, to-wit, that by the record aforesaid, it appears that the Circuit Judge ruled, held and adjudged, among other things, that the said so-called repealing acts, num-

bered respectively 455 and 492, of the Local Acts of 1905, of the legislature of the State of Michigan, and each of them, were valid and not in conflict with Sec. 43 of Art. 4 of the Constitution of the State of Michigan.

Eighth. There is also error in this, to-wit, that by the record aforesaid, it appears that the Circuit Judge ruled, held and adjudged, among other things, that the said so-called repealing acts, numbered respectively 455 and 492, of the Local Acts of 1905, of the legislature of the state of Michigan, and each of them, were valid and not in conflict with Sec. 2 of Art. 18 of the Constitution of the State of Michigan.

Tenth. There is also error in this, to-wit, that by the record aforesaid, it appears that the Circuit Judge ruled, held and adjudged, among other things, that the said so-called repealing acts, numbered respectively 455 and 492, of the Local Acts of 1905, of the
54 legislature of the state of Michigan and each of them, were valid and not in conflict with Sec. 10 of Art. 1 of the Constitution of the United States, providing that no state shall pass any law impairing the obligation of contracts.

Eleventh. There is also error in this, to-wit, that by the record aforesaid, it appears that the Circuit Judge ruled, held and adjudged, among other things, that the said so-called repealing acts, numbered respectively 455 and 492, of the Local Acts of 1905, of the legislature of the State of Michigan and each of them, were valid and not in conflict with the 14th amendment of the constitution of the United States, prohibiting the state from making, or enforcing, any law which shall deprive any person of property, without due process of law.

Twelfth. There is also error in this, to-wit, that by the record aforesaid, it appears that the Circuit Judge ruled, held and adjudged, among other things, that each of the aforesaid so-called Acts, No. 455 and No. 492, of the Local Acts of 1905, were valid and enforcible in the aforesaid *quo warranto* proceedings, instituted at the instance of said three relators, who were acting for and in behalf and for the benefit of the City of Grand Rapids, whereas, it appears by the aforesaid record, that each of said Acts was, as a matter of fact, passed by the legislature of the state of Michigan, as mere local acts, at the wrongful instance of the City of Grand Rapids, for its own selfish and pecuniary advantage, in pursuance of a devised plan and without the President and Directors of the Grand Rapids Hydraulic Company having reasonable notice or any opportunity to be heard on the merits of the so-called repealing measures.

Thirteenth. There is also error in this, to-wit, that by the record aforesaid and by the plea of the respondents, it appears, as a fact, that the City of Grand Rapids, by its officers and agents, wrongfully induced the legislature of the state of Michigan, to pass both
55 of said so-called repealing acts numbered respectively 455 and 492, as local measures without notice to or hearing the said Hydraulic Company, and with the intent to benefit said city, by putting its competitor, the Hydraulic Company, out of the water supply business in the City of Grand Rapids, and by the record

aforesaid it appears that the said Circuit Court erred in holding and adjudging that both or either of said Acts No. 455 and No. 492, were valid and enforcible, notwithstanding the aforesaid wrongful conduct of the City of Grand Rapids in procuring the passage of said acts as local measures for its own benefit.

Fourteenth. There is also error in this, to-wit, that by the record aforesaid and on the face of each of the aforesaid so-called repealing acts No-. 455 and 492, it appears that the effect of each of said acts, if enforced, would reduce materially the value of, and impair the mortgage security legally held by the bondholders on the franchises and property of the said Hydraulic Company; that each of said repealing acts, constituted a unit or an indivisible whole and said Circuit Court erred in construing and interpreting said acts, by ruling and holding that each of them was valid, although if enforced according to their terms, they would greatly depreciate the value of, and impair the valid mortgage security, held by the good faith bondholders on the franchises and property of the company.

Fifteenth. There is also error in this, to-wit, that by the record aforesaid it appears that the rulings, orders and judgment of said Circuit Court in form aforesaid given, sustained the demurrer to the respondents' plea, on the ground that such plea did not show authority in the respondents to act legally under the name and style of the Grand Rapids Hydraulic Company, as a corporation, whereas, by the law of the land the said demurrer ought to have been overruled for the reason, that said plea in form aforesaid did show
sufficient authority in the respondents to act as they did
56 under the name and style of the Grand Rapids Hydraulic Company.

Sixteenth. That by the record aforesaid, it appears that the judgment in form aforesaid was given for the said plaintiff, against the said respondents, John F. Calder, David A. Crow, John E. More, Thomas H. Keogh and Willard Kingsley, whereas, by the law of the land, the said judgment ought to have been given for the respondents against the said plaintiff, on the facts stated in the said plea of said respondents to the information filed in said proceedings.

Seventeenth. There is also error in this, to-wit, that by the record aforesaid it appears that the final judgment aforesaid, in form aforesaid, was given for the plaintiff against the respondents, whereas, by the law of the land, the said judgment ought to have been given for the respondents, against the said plaintiff, for the reason that their aforesaid plea did show an existing franchise and charter under which they were acting rightfully with sufficient authority to act as lawful directors of the Grand Rapids Hydraulic Company, as an existing corporation in this state.

Eighteenth. There is also error in this, to-wit, that by the record aforesaid is appears that said Circuit Court erred in its rulings, and judgment in sustaining the aforesaid demurrer to respondents' plea and in making and rendering the said final judgment of ouster against the respondents aforesaid, for the reason that the aforesaid Acts No. 455 and No. 492 of the Local Acts of Michigan, session 1905, were both void and neither of them was enforcible against said respondents, in the aforesaid *quo warranto* proceedings.

And for the errors aforesaid, said respondents say, that the judgment entered in said cause, ought to be set aside, vacated, and held for naught.

KINGSLEY & WICKS,
Attorneys for Respondents.

JOHN E. MORE,
Of Counsel.

21354. State of Michigan. In the Circuit Court for the County of Kent. People of the State of Michigan, etc., plaintiff, vs. John F. Calder, et al, respondents. Assignments of error. Kingsley & Wicks, attorneys for respondents. John E. More, of counsel. Received and filed, June 28, 1907. Louis H. Dolan, deputy clerk.

57 This cause was brought to the Supreme Court by writ of error issued to the Circuit Court for the County of Kent, whereupon the following proceedings were had:

58 At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the Thirteenth Day of January, in the Year of Our Lord One Thousand Nine Hundred and Eight.

Present the Honorable Claudius B. Grant, Chief Justice; Charles A. Blair, Robert M. Montgomery, Russell C. Ostrander, Frank A. Hooker, Joseph B. Moore, William L. Carpenter, Aaron V. McAlvay, Associate Justices.

No. 22370.

THE PEOPLE at the Relation of the Attorney General, etc., Appellee.
vs.
JOHN F. CALDER et al., Appellants.

This cause coming on to be heard is argued by Messrs Taggart and Taggart for appellee and by Messrs. Kingsley and More for appellants and submitted.

59 STATE OF MICHIGAN:

Supreme Court.

Opinion.

Filed July 13, 1908.

THE PEOPLE OF THE STATE OF MICHIGAN, by the Attorney General, at the Relation of George E. Ellis, Moses Taggart, and Samuel A. Freshney, Relators and Appellees,
v.
JOHN F. CALDER, DAVID A. CROW, JOHN E. MORE, THOMAS H. KEOGH, and WILLARD KINGSLEY, Defendants and Appellants.

Before Grant, C. J.; Blair, Moore, Carpenter, and McAlvay, JJ.

This is a quo warranto proceeding instituted in the Kent circuit court to test the right of respondents to act as a corporation under the

name and style of the Grand Rapids Hydraulic Company. The Grand Rapids Hydraulic Company was incorporated under Act 223 of the laws of 1849, for the purpose of supplying water for the use of the inhabitants of Grand Rapids. The act contained no limitation upon the life of the corporation save this: It was provided that "the legislature may at any time hereafter amend or repeal this act." In 1905 the legislature exercised this authority, and by Acts No. 455 and No. 492 of the Local Acts of that year repealed said act No. 223 of the Laws of 1849. At the same time it gave to said company the right to present a claim for the value of its tangible property to the common council of the city of Grand Rapids.

The question in this case is whether said repealing acts are constitutional. Relators contend that they are. Respondents deny this. The circuit court held that they were constitutional and entered a judgment of ouster against respondents. Respondents bring the case to this court for review. They contend that the repealing acts are unconstitutional for various reasons, which will be considered under the following heads:

60 1. Motives of the legislators.
2. Notice of hearing.
3. General constitutional objections.
4. Estoppel.
5. Provision for presentation of claim.

CARPENTER, *J.* (After stating the facts.)

1. Motives of the legislators.

The respondents admit that more than two-thirds of the members elect to each house voted for the repealing laws in question. They complain because they were denied the right to prove that they so voted without investigating the merits, and "without in fact exercising their judgment and discretion on the merits" in compliance with a custom relating to local measures and in reliance upon the representations of the members of Kent county to the effect "that the delegation from Kent county was a unit in favor of said bill and that it did not involve a subject in which the people of the State of Michigan were interested." We think the ruling complained of was correct. In People v. Gardner, 143 Mich. at p. 108, we quoted with approbation from Cooley's Const. Limt. (7th Ed.) p. 257, as follows:

"And although it has sometimes been urged at the bar that the courts ought to inquire into the motives of the legislature where fraud and corruption were alleged, and annul their action if the allegation were established, the argument has in no case been acceded to by the judiciary, and they have never allowed the inquiry to be entered upon. The reasons are the same here as those which preclude an inquiry into the motives of the governor in the exercise of a discretion vested in him exclusively. He is responsible for his acts in such a case, not to the courts, but to the people."

"In this connection we notice the contention of respondent that in repealing that law the legislature must act in good faith. It is sufficient to say that the courts must conclusively presume that the

legislature did act in good faith. Under the rule above stated the courts have no authority to investigate that question."

The only cases to which our attention is called which oppose this principle relate to certain proceedings of municipal bodies. The principle of those cases is limited. It does not extend even to
61 legislative action of municipal bodies. It certainly does not apply to this case. This was decided in People v. Gardner, supra.

2. Notice and hearing.

Respondents contend that they were not given the notice and hearing to which they were entitled by Section 16 of Art. 15 of our constitution. That Section reads:

"Previous notice of any application for an alteration of the charter of any corporation shall be given in such manner as may be prescribed by law."

The repealing law was enacted twice by the legislature in 1905. One of these laws is No. 455 of the Local Acts; the other is Act 492. Act. No. 455 received the approval of the Governor April 5th, 1905. Act No. 492 received the approval of the Governor April 25th, 1905. It appears from respondent's plea that they had no formal notice of this pending legislation. They did however learn of it and were afforded a hearing by the Governor, but were denied a hearing by each house of the legislature. It also appears by their plea that the bills were introduced by legislators from Kent County who had been requested to take this action by the municipal authorities of the city of Grand Rapids. It also appears that the legislator who introduced the bill had given more than one day's notice of his intention so to do. Each of the acts was passed in due form. Act 492 received a vote of more than two-thirds of the members elect to each house. Under these circumstances were respondents denied any rights given them by Section 16 of Art. 15?

At the first session of the legislature after the constitution of 1850 took effect it passed a law providing for the giving of notice in cases coming under said Section 16. That law is found in Sections 8569, 8570 and 8571 of the Comp. Laws of 1897. Of this law it was said b*by* Justice Christiancy in People v. Hurlbut, 24 Mich. at p. 54.

"The effect of this act and of the constitutional provision
62 under which it was framed, would be to justify the legislature in disregarding, and probably—while the act remains in force—to impose upon them the duty to disregard the *application* as such, until the proper notice should have been given as provided by the act. It does not, however, operate to restrict the right of the legislature itself to make such amendment as they may think the public interest may require; nor does it restrict the right of any member of either house of introducing a bill for that purpose on giving one day's previous notice of his intention so to do. Nor do we think, as insisted by the counsel for the respondents, that the notice, when given in either house by a member, is by this act required, as in case of an *'application'* in behalf of the corporation or individuals, 'to set forth briefly the nature of the alteration *applied* for.' This provision applies only to cases where alterations are *'applied for'* from *without*

the legislature itself, and is coextensive *only* with the provision requiring the publication of the notice of such application. The provision allowing a member of either house to give one day's notice of the intention to introduce a bill for such purpose was, we think, intended to recognize the almost universal custom of practice in legislative bodies in this country, to require one or more days' notice from a member, of his intention to introduce, or ask leave to introduce, a bill; in which case nothing more than the title or general object of the bill is usually required.

"It is urged that if this be the true construction of the constitution and the act, both may be readily evaded; as it would always be practicable for the corporation to procure some member of the house or senate to give the one day's notice, and to introduce the bill on his own responsibility as a member. This may or may not be true; but if true, it is a difficulty inherent in the nature of the subject itself, and for which the courts cannot provide a remedy. A proper respect for a co-ordinate branch of the government requires us to presume that each member of the legislature acts upon his individual conviction of public duty, and that he will not become the willing instrument of designing parties to enable them to evade the statute or the constitution."

This reasoning, which we thoroughly approve, answers every argument advanced by respondents in support of their claim that they were entitled to notice under Section 16 of Art. 15, above quoted. Perhaps it might also be stated that Section 16 of Art. 15 has no application to a repeal of a charter. There is a distinction between an alteration and repeal. See Yeaton v. Bank of Old Dominion, 21 Gratt. (W. Va.) 593.

3. General constitutional objections.

In the circuit court respondents urged that the repealing act impaired the obligations of the contract between the Hydraulic Company and the state contrary to the provisions of the constitution of the United States; that it deprived the company of its property without due process of law, contrary to the provisions of the con-
62½ stitution of the state of Michigan and of the Fourteenth Amendment of the constitution of the United States; that it took its private property for public use in contravention of Section 2 of Art. 18 of the constitution of Michigan. In our judgment none of these objections are tenable. The repealing act does not take from the corporation any personal or real property acquired during its legal existence. It does take from it this, and only this: its right to continue to be a corporation. It takes from it no right, franchise or power which does not depend for its existence upon the granting clause of the charter and these it had a legal right to take. Greenwood v. Freight Co., 105 U. S. 21. These rights it obtained from the legislature of the State of Michigan. By its terms the law granting these rights might at any time be repealed by the legislature. The corporation would exist until and only until the legislature *appealed* the law creating it. The life of the corporation expired, according to the terms of its charter with the repeal of the law. Any argument that the repeal destroyed any constitutional right must

rest upon the impossible assumption that the corporation had a legal right to exist for a term longer than that specified in its charter. It had no such right. If authority in support of this reasoning be needed, we think it is found in Greenwood v. Freight Company, supra.

In this connection we consider the claim of respondents that the constitutional rights of certain holders of bonds of the corporation are impaired by the repealing acts. These holders of bonds are creditors of the corporation who are secured by mortgages upon the corporate property and franchises. We deem it sufficient to say that the franchise mortgaged to secure these bonds was no other than that granted to the corporation. Nor did the mortgage in any way change its effect or lessen the right of the legislature to repeal it at any time. The bondholders acquired no greater rights than
63 the corporation had. The existence of the bonds secured by the mortgage is therefore an entirely immaterial circumstance and in no way affects the correctness of the foregoing reasoning.

4. Estoppel.

"Respondents contend that the repealing acts cannot be enforced because they were passed in consequence of the wrongful conduct of certain officials of the city of Grand Rapids. Whether the principle of estoppel can ever be invoked to prevent the enforcement of a valid legislative enactment we do not decide. We do decide that it cannot be invoked in this case. Here the repealing acts are sought to be enforced not for the benefit of those whose conduct was wrongful, but for the benefit of the entire inhabitants of a great city who were guilty of no wrong. Their right to have the law enforced cannot be affected by the circumstance that some agent of the municipality acted improperly in procuring its enactment."

5. Provision for presentation of claim.

The repealing acts give the corporation the right to present a claim for its tangible property to the common council of the city of Grand Rapids. It is contended that this provision is unconstitutional because (*a*) it permits property to be taken for the public without the determination of necessity as provided in the constitution; and (*b*) that the compensation provided therein is unlawful and inadequate. It is a sufficient answer to each of these claims to say that this provision is not compulsory. It has no force unless the corporation chooses to accept it. If the corporation does accept, it voluntarily sells its property on the terms stated in said provision. To this there is no constitutional objection.

It results from this reasoning that the judgment of the circuit court must be affirmed.

WILLIAM L. CARPENTER.
CLAUDIUS B. GRANT.
CHAS. H. BLAIR.
JOSEPH B. MOORE.
AARON V. McALVAY.

64 At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the Thirteenth Day of July, in the Year of our Lord One Thousand Nine Hundred and Eight.

Present: The Honorable Claudius B. Grant, Chief Justice; Charles A. Blair, Robert M. Montgomery, Russell C. Ostrander, Frank A. Hooker, Joseph B. Moore, William L. Carpenter, Aaron V. McAlvay, Associate Justices.

Judgment.

No. 22370.

JOHN E. BIRD, Attorney General, on Relation of GEORGE E. ELLIS, MOSES TAGGART, and SAMUEL A. FRESHNEY, Relators,

vs.

JOHN F. CALDER, DAVID A. CROW, JOHN E. MORE, THOMAS H. KEOGH, and WILLARD KINGSLEY, Respondents and Appellants.

The record and proceedings in this cause having been removed to this court by Writ of Error, issued to the Circuit Court for the County of Kent, and the same, and the matters in Error assigned, having been seen and inspected and duly considered by the Court, and it appearing to this Court that in said record and proceedings, and in the giving of judgment in said Circuit Court there is no error, Therefore it is ordered and adjudged that the judgment of said Circuit Court for the County of Kent be and the same is hereby in all things affirmed, and that the relators do recover of the respondents, their costs, to be taxed, and that they have execution therefor.

65 STATE OF MICHIGAN:

In the Supreme Court.

Defendants' Exceptions to Judgment of Supreme Court.

June Term, 1908.

THE PEOPLE OF THE STATE OF MICHIGAN, by the Attorney General, at the Relation of George E. Ellis, Moses Taggart, and Samuel A. Freshney, Plaintiff and Appellee,

vs.

JOHN F. CALDER, DAVID A. CROW, JOHN E. MORE, THOMAS H. KEOGH, and WILLARD KINGSLEY, Respondents and Appellants.

Because in the record and proceedings as, also, in the rendition of the judgment of this Court, affirming the judgment of ouster rendered in this suit, by the Circuit Court for the County of Kent, in said State, it appears that two Federal questions were drawn in

question, that the Respondents properly raised both of them, in their joint plea as well as in their assignments of error in this Court, but this honorable Court by its said final judgment as of date July 13, 1908, decided each of them adversely to said respondents. The said two questions so raised by the Respondents were, namely:

66 First, that the so-called repealing acts numbered respectively, 455 and 492 of the Local Acts of 1905, of the Legislature of the State of Michigan, and each of them was in conflict with Section (10) of Article (1) of the Constitution of the United States, providing that no State shall pass any law impairing the obligation of contracts;

Secondly, that each of said Acts was in conflict with the 14th Amendment of the Constitution of the United States, prohibiting a State from making or enforcing any law, which shall deprive any person of property without due process of law.

Therefore, now comes said Respondents by their Attorneys, Kingsley & Wicks, and take exception to the rendition of the aforesaid final judgment by this honorable Court in favor of the Plaintiff and Appellee and against these Respondents.

Dated at Lansing, Michigan, July 30, 1908.

KINGSLEY & WICKS,
Attorneys for Respondents.

JOHN E. MORE,
Of Counsel.

(Endorsed:) Filed Aug. 1, 1908. Chas. C. Hopkins, Clerk Supreme Court.

67 STATE OF MICHIGAN:

In the Supreme Court.

Defendants' Amended Exceptions to Judgment of Supreme Court.

THE PEOPLE OF THE STATE OF MICHIGAN, by the Attorney General, at the Relation of George E. Ellis, Moses Taggart, and Samuel A. Freshney, Plaintiff and Appellee,

vs.

JOHN F. CALDER, DAVID A. CROW, JOHN E. MORE, THOMAS H. KEOGH, and WILLARD KINGSLEY, Respondents and Appellants.

Because in the record and proceedings as, also, in the rendition of the judgment of this Court, affirming the judgment of ouster rendered in this suit, by the Circuit Court for the County of Kent, in said State, it appears that two Federal questions were drawn in question; that the respondents properly raised both of them in their joint plea as well as in their assignments of error in this Court, but this honorable Court by its said final judgment as of date July 13, 1908, decided each of them adversely to said respondents. The said two questions so raised by the respondents were namely:

First. That the so-called repealing acts numbered respectively 455

and 492 of the Local Acts of 1905 of the Legislature of the State of Michigan, and each of them was in conflict with Section 10 of Article I of the Constitution of the United States, providing that no State shall pass any law impairing the obligation of contracts;

Second. That each of said Acts was in conflict with the XIV
68 Amendment of the Constitution of the United States, prohibiting a State from making or enforcing any law which shall deprive any person of property without due process of law.

And because from the record of said cause it appears that the Grand Rapids Hydraulic Company issued its bonds secured by a mortgage upon its property and franchises, which bonds are in the hands of innocent holders for value, and it was claimed by counsel for respondents that the constitutional rights of said bondholders were impaired by the so-called repealing acts, and the said Court in the written opinion of said Court deciding said cause said:

"In this connection we consider the claim of respondents that the constitutional rights of certain holders of bonds of the corporation are impaired by the repealing acts. These holders of bonds are creditors of the corporation who are secured by mortgages upon the corporate property and franchises. We deem it sufficient to say that the franchise mortgaged to secure these bonds was no other than that granted to the corporation. Nor did the mortgage in any way change its effect or lessen the right of the Legislature to repeal it at any time. The holders acquired no greater rights than the corporation did. The existence of the bonds secured by the mortgage is therefore an entirely immaterial circumstance and in no way affects the correctness of the foregoing reasoning."

Therefore, now come said Respondents by their attorneys, Kingsley & Wicks, and take exception to the rendition of the aforesaid final judgment by this honorable Court in favor of the plaintiff and appellee and against these respondents.

Dated at Lansing, Michigan, August 1st, 1908.

KINGSLEY & WICKS,
Attorneys for Respondents.

JOHN E. MORE,
Of Counsel.

(Endorsed:) Filed Aug. 3, 1908. Chas. C. Hopkins, Clerk Supreme Court.

69 UNITED STATES OF AMERICA,
State of Michigan:

Petition for Writ of Error.

To the Honorable Claudius B. Grant, Chief Justice of the Supreme Court of the State of Michigan:

Your petitioners, John F. Calder, David A. Crow, John E. More, Thomas H. Keogh and Willard Kingsley respectfully show that on the seventh day of December, 1906, the People of the State of Michigan by the Attorney General, at the relation of George E. Ellis,

Moses Taggart and Samuel A. Freehney, filed in the Circuit Court for the County of Kent in the State of Michigan an information in the nature of a quo warranto against John F. Calder, David A. Crow, John E. More, Thomas H. Keogh and Willard Kingsley, then acting as directors of the corporation known as the Grand Rapids Hydraulic Company; that issue was joined and a hearing was had upon said information; that on the twentieth day of May, 1907, the said Circuit Court for the County of Kent rendered final judgment therein that the said respondents be and they thereby were altogether excluded, ousted and prohibited from exercising or assuming to exercise corporate rights, privileges or franchises, or acting or assuming to act as a body corporate and particularly under the name and style of the Grand Rapids Hydraulic Company.

That thereupon the said respondents sued out a writ of error in the Supreme Court of the State of Michigan and afterwards, and on or about the twenty-seventh day of July, 1908, the said Su-
70 preme Court of the State of Michigan rendered final judgment as of date July thirteenth, 1908, against your petitioners by which it affirmed with costs the judgment of said Circuit Court; that said Supreme Court is the highest court of said State in which a decision in said suit can be had.

That your petitioners deem themselves aggrieved by the said decision and judgment of the Supreme Court of the State of Michigan in that the said Supreme Court of the State of Michigan failed to apply and give force and effect to Section 10 of Article I of the Constitution of the United States providing that no State shall pass any law impairing the obligation of contracts, and that said Supreme Court of the State of Michigan further failed to apply and give force and effect to the XIV Amendment of the Constitution of the United States prohibiting the State from making or enforcing any law which shall deprive any person of property without due process of law. All of which will appear by reference to the record of judicial proceedings in said cause which is herewith submitted, and from the assignments of error attached to this petition.

Wherefore your petitioners pray for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Michigan and for citation and supersedeas, etc.

And your petitioners will ever pray.

JOHN F. CALDER,
JOHN E. MORE,
WILLARD KINGSLEY,
DAVID A. CROW,
THOMAS H. KEOGH,
By KINGSLEY & WICKS,
Attorneys for Plaintiffs in Error.

JOHN E. MORE, *Counsel.*

71 UNITED STATES OF AMERICA:

Supreme Court of the State of Michigan.

JOHN F. CALDER, DAVID A. CROW, JOHN E. MORE, THOMAS H. KEOGH, and WILLARD KINGSLEY, Plaintiffs in Error,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN, by the Attorney General, at the Relation of George E. Ellis, Moses Taggart, and Samuel A. Freshney, Defendants in Error.

Now come the plaintiffs in error and respectfully submit that in the record proceedings, decision and final judgment of the Supreme Court of the State of Michigan in the above entitled cause there is manifest error in this, to-wit:

First. That by the record aforesaid it appears that the judgment in form aforesaid was given for the said defendant in error against the said plaintiffs in error, whereas by the law of the land the said judgment ought to have been given for the plaintiffs in error against the said defendant in error, for the reason that said record shows an existing franchise and charter under which said plaintiffs in error were acting rightfully, with sufficient authority to act as lawful directors of the Grand Rapids Hydraulic Company as an existing corporation in the State of Michigan.

Second. Said court erred in this, in deciding "that the courts must conclusively presume that the legislature did act in good faith. Under the rule above stated the courts have no authority to investigate that question."

72 *Third.* That the court erred in holding and deciding that the so-called repealing acts numbered respectively 455 and 492 of the Local Acts of 1905 of the Legislature of the State of Michigan were valid.

Fourth. That the court erred in holding and deciding that Act No. 455 of the Local Acts of 1905 of the Legislature of the State of Michigan was valid.

Fifth. That the court erred in holding and deciding that Act No. 492 of the Local Acts of 1905 of the Legislature of the State of Michigan was valid.

Sixth. That the court erred in holding and deciding, as appears from the written opinion of said court as follows:

"In the Circuit Court respondents urged that the repealing act impaired the obligations of the contract between the Hydraulic Company and the State contrary to the provisions of the Constitution of the United States; that it deprived the Company of its property without due process of law contrary to the provisions of the Constitution of Michigan and of the XIV Amendment of the Constitution of the United States; that it took its private property for public use in contravention of Section 2 of Article XVIII of the Constitution of Michigan. In our judgment none of these objections are tenable. The repealing act does not take from the corporation any personal or real property acquired during its legal existence. It does take

from it this and only this: its right to continue to be a corporation. It takes from it no right, franchise or power which does not depend for its existence upon the granting clause of the charter, and these it had a legal right to take. Greenwood vs. Freight Company, 105 U. S. 21. These rights it obtained from the Legislature of the State of Michigan. By its terms the law granting these rights might at any time be repealed by the Legislature. The corporation would exist until and only until the Legislature repealed the law creating it. The life of the corporation expired according to the terms of its charter with the repeal of the law. Any argument that the repeal destroyed any constitutional right must rest upon the impossible assumption that the corporation had a legal right to exist for a term longer than that specified in its charter. It had no such right."

73 *Seventh.* The said court erred in holding and deciding that the said so-called repealing acts numbered respectively 455 and 492 of the Local Acts of 1905 of the Legislature of the State of Michigan, and each of them, were valid and not in conflict with Section 10 of Article I of the Constitution of the United States providing that no State shall pass any law impairing the obligation of contracts.

Eighth. The said court erred in holding and deciding that the said so-called repealing acts numbered respectively 455 and 492 of the Local Acts of 1905 of the Legislature of the State of Michigan, and each of them, were valid and not in conflict with the XIV Amendment of the Constitution of the United States providing that no State shall pass any law depriving any person of property without due process of law.

Ninth. That the said court erred in holding and deciding as appears from the written opinion of said court that the constitutional rights of certain holders of the bonds of the Grand Rapids Hydraulic Company were not impaired by the repealing acts.

"These holders of bonds are creditors of the corporation who are secured by mortgages upon the corporate property and franchises. We deem it sufficient to say that the franchise mortgaged to secure these bonds was no other than that granted to the corporation. Nor did the mortgage in any way change its effect or lessen the right of the Legislature to repeal it at any time. The bondholders acquired no greater rights than the corporation had. The existence of the bonds secured by the mortgage is therefore an entirely immaterial circumstance and in no way affects the correctness of the foregoing reasoning."

Wherefore the said plaintiffs in error pray that for the errors aforesaid and other errors appearing in the record of said

74 Supreme Court of the State of Michigan in the above entitled cause to the prejudice of the plaintiffs in error, the said judgment of the said Supreme Court of the State of Michigan be reversed, annulled and for naught esteemed, and that said cause be remanded to the Supreme Court of the State of Michigan with instructions to enter judgment in favor of the plaintiffs in error, or for such further proceedings in said cause as may be determined

upon by this honorable court to the end that justice may be done in the premises.

WILLARD KINGSLEY,
JOHN E. MORE,
Attorneys for Plaintiffs in Error.

74½ [Endorsed:] United States of America. State of Michigan. John F. Calder, David A. Crow, John E. More, Thomas H. Keogh and Willard Kingsley, Plaintiffs in Error, vs. The People of the State of Michigan, by the Attorney General, at the Relation of George E. Ellis, Moses Taggart and Samuel A. Freshney, Defendants in Error. Petition for Writ of Error and Assignments of Error. Willard Kingsley, John E. More, Attorneys for Plaintiffs in Error.

75 *Bond.*

Know all men by these presents, That we, John F. Calder, David A. Crow, John E. More, Thomas H. Keogh and Willard Kingsley, as principals, and the American Surety Company of New York, as surety, are held and firmly bound unto The People of the State of Michigan, by the Attorney General, at the relation of George E. Ellis, Moses Taggart and Samuel A. Freshney, in the just and full sum of one thousand dollars ($1,000.), to be paid to the People of the State of Michigan by the Attorney General at the relation of George E. Ellis, Moses Taggart and Samuel A. Freshney, or their certain attorney or assigns; to which payment well and truly to be made we bind ourselves, our heirs executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this first day of August, in the year of our Lord one thousand nine hundred and eight.

Whereas, lately at a session of the Supreme Court of the State of Michigan, in a suit depending in said Court, between the People of the State of Michigan by the Attorney General, at the relation of George E. Ellis, Moses Taggart and Samuel A. Freshney, plaintiff and appellee, and John F. Calder, David A. Crow, John E. More, Thomas H. Keogh and Willard Kingsley, respondents and appellants, a final judgment was rendered against the said John F. Calder, David A. Crow, John E. More, Thomas H. Keogh and Willard Kingsley, and the said John F. Calder, David A. Crow John E. More, Thomas H. Keogh and Willard Kingsley having obtained a writ of error and filed a copy thereof in the clerk's office of the said Court to reverse the judgment in the aforesaid suit and a citation directed to the People of the State of Michigan by the Attorney General, at the relation of George E. Ellis, Moses Taggart and Samuel A. Freshney, citing and admonishing it to be and appear at the Supreme Court of the United States at Washington, within thirty days from the date hereof,

76 Now the condition of the above obligation is such that if the said John F. Calder, David A. Crow, John E. More, Thomas H. Keogh and Willard Kingsley shall prosecute their said writ of error to effect and answer all damages and costs, if they shall

fail to make their plea good then the above obligation to be void; else to remain in full force and virtue.

JOHN F. CALDER, [SEAL.]
JAMES R. FITZPATRICK, *Ag't.*
DAVID A. CROW, [SEAL.]
WILLARD KINGSLEY, *Agent.*
JOHN E. MORE. [SEAL.]
THOMAS H. KEOGH, [SEAL.]
JAMES R. FITZPATRICK, *Ag't.*
WILLARD KINGSLEY. [SEAL.]
AMERICAN SURETY COMPANY OF NEW YORK, [SEAL.]
By HERBERT N. MORRELL,
Resident Vice President.
A. E. EWING,
Resident Assistant Secretary.

[Seal of Surety Company.]

I approve the above bond.
CLAUDIUS B. GRANT,
Chief Justice Supreme Court of Michigan.

(Endorsed:) Filed Aug. 14, 1908. Chas. C. Hopkins, Clerk Supreme Court.

77 UNITED STATES OF AMERICA, *ss:*

To The People of the State of Michigan, by the Attorney General, at the relation of George E. Ellis, Moses Taggart, and Samuel A. Freshney, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Michigan, wherein John F. Calder, David A. Crow, John E. More, Thomas H. Keogh and Willard Kingsley, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Claudius B. Grant, Chief Justice of the Supreme Court of the State of Michigan, this 12th day of August, in the year of our Lord one thousand nine hundred and eight.

[Seal of the Supreme Court of Michigan, Lansing.]

CLAUDIUS B. GRANT,
Chief Justice of the Supreme Court of the State of Michigan.

77½ I hereby accept and acknowledge due service of the within citation.

Dated August 15, 1908.

HENRY E. CHASE,
Deputy Attorney General of the State of Michigan.
MOSES TAGGART,
Attorney for Defendants in Error.

78 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Michigan, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The People of the State of Michigan, by the Attorney General, at the relation of George E. Ellis, Moses Taggart, and Samuel A. Freshney, Plaintiff and John F. Calder, David A. Crow, John E. More, Thomas H. Keogh and Willard Kingsley, Defendants, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction
79 of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission and the XIV Amendment of said Constitution; a manifest error hath happened to the great damage of the said John F. Calder, David A. Crow, John E. More, Thomas H. Keogh and Willard Kingsley, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 12th day of August, in the year of our Lord one thousand nine hundred and eight.

[Seal of the U. S. Circuit Court, Western District of Mich., Southern Division.]

CHARLES L. FITCH.
Clerk of the Circuit Court of the United States for the Western District of Michigan.

Allowed by
CLAUDIUS B. GRANT.
Chief Justice of the Supreme Court of the State of Michigan.

To the Supreme Court of the United States:

The execution of the within Writ appears by transcript of record hereto annexed.

[Seal of the Supreme Court of Michigan, Lansing.]

CHAS. C. HOPKINS,
Clerk Supreme Court of the State of Michigan.

80 Supreme Court of the State of Michigan.

JOHN F. CALDER, DAVID A. CROW, JOHN E. MORE, THOMAS H. KEOGH, and WILLARD KINGSLEY, Plaintiffs in Error,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN, by the Attorney General, at the Relation of George E. Ellis, Moses Taggart, and Samuel A. Freshney, Defendant in Error.

STATE OF MICHIGAN,
In the Supreme Court, ss:

I, Charles C. Hopkins, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of the record and of all proceedings had and determined in the above entitled cause by said Supreme Court, including the written decision and reasons therefor, signed by the judges of said Court and filed in my office, as appears of record and on file in said cause; that I have compared the same with the original and it is a true transcript therefrom and of the whole thereof; that attached thereto are the petition for the writ of error, the writ of error, with allowance endorsed thereon, the citation with acceptance of service by the adverse party, a copy of the bond to the adverse party, duly approved, together with the assignments *pf* error in the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Supreme Court at the City of Lansing, this eighteenth day of August in the year of our Lord one thousand nine hundred and eight.

[Seal of the Supreme Court of Michigan, Lansing.]

CHAS. C. HOPKINS,
Clerk Supreme Court of the State of Michigan.

Endorsed on cover: File No. 21,309. Michigan Supreme Court. Term No. 240. John F. Calder, David A. Crow, John E. More, Thomas H. Keogh, and Willard Kingsley, plaintiffs in error, vs. The People of the State of Michigan, by the Attorney General, at the relation of George E. Ellis, Moses Taggart, and Samuel A. Freshney. Filed August 20th, 1908. File No. 21,309.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1908.

No. [illegible].58.

JOHN F. CALDER, et al.,
Plaintiffs in Error,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN,
ex rel, George E. Ellis, et al.

MOTION OF PLAINTIFFS IN ERROR FOR SUPERSEDEAS.

WILLARD KINGSLEY,
JOHN E. MORE,
Counsel for Plaintiffs in Error.

Press of the Dean-Hicks Printing Co., Grand Rapids, Mich.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1908.

No. 513.

Gentlemen:—

Please take notice that the within motion will be presented to the Court on Monday, November 23, 1908.

Dated November 16, 1908.

Yours, etc.,

.....

.....

Of Counsel for Plaintiffs in Error.

To:

JOHN E. BIRD, *Attorney General,*
MOSES TAGGART, *City Attorney,* and
GANSON TAGGART, *of Counsel.*

Service is hereby accepted this.....day of November, 1908.

.....

Attorney General.

.....

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Of Counsel.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1908.

No. 513.

JOHN F. CALDER, ET AL.,
PLAINTIFFS IN ERROR,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN,
EX REL
GEORGE E. ELLIS, ET AL.

MOTION OF PLAINTIFFS IN ERROR.

The plaintiffs in error respectfully move the Court for a supersedeas, and show that in the record filed in this Court, the following facts appear:

1.

The plaintiffs in error are the directors of the Hydraulic Company, supplying water in Grand Rapids, Michigan; they were the respondents in quo warranto proceedings begun in a local state court. A judgment of ouster was rendered by the trial court on May 7, 1907. The state filed a short information, to which the directors of the Hydraulic Company, according

to the established practice of the state, filed a lengthy answer in lieu of the usual common law plea; to this answer the state filed a special demurrer. The Hydraulic Company filed a joinder in this demurrer. The demurrer was sustained, and judgment of ouster rendered on the pleadings. The case was immediately removed by writ of error to the supreme court of the state of Michigan, which tribunal affirmed the primary judgment of ouster on July 13, 1908.

A writ of error was applied for immediately, and a regular supersedeas bond was tendered for "damages and costs," in the penal sum of one thousand dollars. Mr. Chief Justice Grant, of the supreme court of the state, allowed the writ of error, signed the citation, approved the supersedeas bond, but did not make a supersedeas order as requested. These approved documents were filed with the clerk of the supreme court of the state on August 14, 1908. This record was forwarded from Lansing, and filed in the office of the Clerk of the Supreme Court of the United States on August 20, 1908.

HYDRAULIC COMPANY.

This company received from the state a special charter, nearly sixty years ago. It was to supply water to the city of Grand Rapids, from brooks and springs; its life was to be perpetual. The city system pumps its water from a river running through the municipality, and the two water supplying systems are in direct competition.

This special charter, granted in 1849, contained a reserve power clause, which reads:

"The legislature may at any time hereafter amend or repeal this Act."

The Michigan courts held that this power to repeal at any time was equivalent to an express power to repeal *at the pleas-*

ure of the legislature, and that body could act arbitrarily without reason, or at their mere whim. It will be noticed the significant words, that this special charter could be repealed "at the pleasure of the legislature," were intentionally omitted from the reserved power to repeal at any time.

On this particular point we call attention to the allegations in paragraph 3 of the Hydraulic answer or plea, where this language will be found:

> "These respondents further aver that on the evening of March 28, 1905, the officers of the Hydraulic Company learned for the first time from outside sources, that a bill to repeal its charter had that day been introduced into the legislature; that on the morning of March 29, 1905, John E. More, who was the Vice-President and Secretary of the Hydraulic Company, and Thomas H. Keogh, of the city of Grand Rapids, who represented several non-resident stockholders in and bondholders of the Hydraulic Company, went to Lansing, where they had separate interviews at the capital building with Representative George E. Ellis and Senator Andrew Fyfe, before the legislative session began on that day; they then and there protested to them against the passage of said bill in the mode and manner contemplated; they then and there with insistency, requested the said Senator and Representative to afford the Hydraulic Company a fair opportunity to be heard on the merits of the bill, but this protest was relentlessly ignored and such urgent and reasonable requests were unconditionally rejected and absolutely refused by both Representative George E. Ellis and Senator Andrew Fyfe, who at the capitol building, then had charge of this measure pending in the legislature."

In support of the idea that the reserved right to repeal could not be used arbitrarily, or through mere caprice, we beg to call attention to what Mr. Justice White said, in Stearns v Minnesota, 179 U. S., 223, *259:*

"It has been * * * determined that the reserved right to *repeal,* alter or amend does *not* confer mere *arbitrary power;* and cannot be so exercised as to violate the *fundamental principles* of justice by depriving of the equal protection of the laws or of the constitutional guarantee against the taking of property without due process of law."

TWO FEDERAL QUESTIONS.

There are several assignments of error, which may be classified under two heads: (a) The arbitrary action of the legislature violated the obligation of the charter contract; (b) That the oppressive action of the legislature was in conflict with the 14th Amendment, regarding the taking of property without due process of law.

The respondents respectfully state that the Hydraulic Company does not insist upon the amount of the penalty of the bond approved by the Chief Justice of the state; we recognize that this Court has full power to order a larger bond. *But in this connection, we wish to call attention to the condition of the supersedeas bond; it will be noticed, the bond runs to the state, and not to the municipality; the city itself can not bring suit on this bond; on the contrary, if the Hydraulic Company should in any way injure the city before this case shall be heard and determined, it can bring a suit at law against the company for damages.*

In support of this motion we call attention to

(a) Kitchen v. Randolph, 93 U. S., 86.

(b) Draper v. Davis, 102 U. S., 370, *371.* (Mr. Chief Justice Waite): "The power of the justice over the appeal and the security, in the absence of fraud, was exhausted when he took the security and signed the citation. From that time the control of the supersedeas, as well as the appeal, was trans-

ferred to this Court, and even here, as we held in Jerome v. McCarter, (21 Wall. 17), in the absence of fraud, the action of the justice or judge in accepting the security, within the statute and within our rules adopted for his guidance, was final, so far as it depended on facts existing at the time the security was accepted."

(c) Butchers' Association v. Slaughter House Company, 4 Fed. Cases, 891. (Case No. 2234, headnote 3, Mr. Justice Bradley.) "It seems to be the settled understanding of the courts of the United States, that both appeals and writs of error operate as a supersedeas, without any express order to that effect."

(d) Arnold v. Frost, 1 Fed. Cases, 1179, *1180,* (Case No. 558, Judge Blatchford.) "It is well settled that an appeal becomes a supersedeas, and stays execution in the Court which rendered the decree, not by virtue of any order to that effect, but by virtue of a compliance with the conditions prescribed by the statute. When those conditions are complied with, the statute operates to suspend the jurisdiction of the court below, and to stay execution in the case, pending the appeal."

WILLARD KINGSLEY,
JOHN E. MORE,
Of counsel.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 513.

JOHN F. CALDER, DAVID A. CROW, JOHN E. MORE, THOMAS H. KEOGH, and WILLARD KINGSLEY,

Plaintiffs in Error,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN, by the Attorney General, at the relation of GEORGE E. ELLIS, MOSES TAGGART and SAMUEL A. FRESHNEY.

Affidavit.

UNITED STATES OF AMERICA,

The State of Michigan, County of Kent, ss:

JAMES R. FITZPATRICK, being first duly sworn, according to law, says, that he is the general manager of the Hydraulic Company, of Grand Rapids, plaintiff in error, and that on or about September 22, 1908, he conferred with Mr. Samuel A. Freshney, general manager of the Board of Public Works of Grand Rapids, concerning the above entitled case. Mr. Freshney said the city would attempt to prevent us making extensions to our system; he would not admit that we had any right to make even lateral connections to our system.

On or about September 23rd, affiant called on Mr. Taggart, city attorney, to discuss the present relations of the city and

the Hydraulic Company. The city attorney would not concede we had any right to make extensions or connections, but said that so long as we confined ourselves to connections, merely, the city would not insist on our observing, literally, the terms of the decision of the supreme court, pending appeal; but if we attempted to make extensions, the city would not permit us to do so, unless ordered by the court.

Affiant further says, that since the temporary order of this Court, made on October 16th last, the Hydraulic Company has put in but three services: a private residence at 349 North Ionia street, the private residence of Mr. Kusterer, on Morris avenue, and the United States government building (post-office); all of these services were contracted for prior to October 16th last, and were put in by local and out-of-town plumbing houses, our part of the work being confined to making the taps only. The laying of the service was done by or under the direction of the plumbers, who also had charge of opening the streets and the proper repairing of them. We are under contract to put in at an early date one other service, to be done by a plumber, and we are to make the tap only.

Further affiant saith not.

JAMES R. FITZPATRICK.

Subscribed and sworn to before me this 16th day of November, 1908.

KIRK E. WICKS,
Notary Public, Kent County, Michigan.

My commission expires March 3, 1910.

[NOTARY SEAL]

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. [redacted] 58.

JOHN F. CALDER ET AL., PLAINTIFFS IN ERROR,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN *EX REL.* GEORGE E. ELLIS ET AL.

DISTRICT OF COLUMBIA,
City of Washington, ss:

Thomas H. Keogh, being duly sworn, deposes and says:

That he is one of the plaintiffs in error in the above-entitled cause.

That deponent has been connected with the Grand Rapids Hydraulic Company as treasurer and in other capacities during the years 1905, 1906, 1907, and 1908, and that during said time all extensions made by said company to its pipe system in the city of Grand Rapids totaled less than five hundred feet, and that not more than about sixty buildings were connected with said system during that time.

Deponent further says that for a number of years past it has been the custom of the city authorities of said city to supervise the refilling of excavations made by said company in the streets of said city, and to do all necessary work in connection with repaving streets at the expense of said company, and that the amount claimed by said city for all

such work during said years and paid by said company is about the sum of three hundred dollars.

Deponent further says that he has read the affidavit of Samuel A. Freshney marked Exhibit "B" "B" in statement and brief of defendants in error, and that the statement contained therein that it has been commonly reported that eastern capitalists intend to tear up the public streets in said city and place water mains therein is without foundation; that deponent represents all the stockholders of said company and the owners of about six hundred and sixty-seven bonds out of a total issue of six hundred and eighty bonds, and that the question of making further extensions has never been considered by said bondholders and stockholders.

Deponent further says that since the incorporation of said company in the year 1849 the village or city of Grand Rapids never has been called upon to pay any damages or costs by reason of the acts of said company.

THOMAS H. KEOGH.

Sworn and subscribed to before me this 30th day of November, 1908.

JAMES D. MAHER,
Notary Public.

UNITED STATES OF AMERICA.

SUPREME COURT

JOHN F. CALDER, ET AL.,
Plaintiffs in Error,
vs.
THE PEOPLE OF THE STATE OF MICHIGAN, EX REL.

October Term, 1908.
Number 513.

MOTION OF PLAINTIFF IN ERROR FOR SUPERSEDEAS AND STAY.

REPLY TO BRIEF OF PLAINTIFFS IN ERROR ON MOTION.

STATEMENT.

In addition to statement of pleadings contained in plaintiff's brief, on pages 3 and 4 we further state.

The answer of the Hydraulic Company, filed in the State Circuit Court in paragraph 3, sets out long detailed specifications and allegations of acts by the members of the legislature and city officials, not properly a part of the pleadings, which were the subject of demurrer.

These were not admitted for such reason by demurrer filed.

The demurrer set up in paragraph 8, as a part thereof, under practice recognized by the Michigan courts, a certified copy of the action of the legislature, in passing the act repealing the Hydraulic Company's charter "ex. A. A." of demurrer.

Paragraph 3 of plaintiff's answer in the State Circuit Court, alleges that a hearing was had, before the Governor April 5, 1905, and that thereafter "on the 12th day of April, 1905, Senator Andrew Fyfe, previous notice under the rules having been given, and leave granted, reintroduced the identical bill hereinbefore referred to and it was read a first and second time, by its title, and pending reference to a committee said Senator Fyfe moved a suspension of the rules and that the bill be placed on its immediate passage." This was the bill that was passed by the legislature, as shown by the pleadings, which is attacked by plaintiffs in error.

HYDRAULIC COMPANY.

Under this heading counsel, in their brief on this motion, entered into a discussion of the merits of the main case.

We do not suppose this permissible to any considerable extent, at least. We can show by both federal and state authorities fully, when the main case is reached, the alleged acts of bad faith, etc., set up in such vigorous language by this remarkable answer, are not admissible in evidence, and therefore not good pleading, in an attack on acts passed by a state legislature.

Chesapeake Transportation Co. v. Manning, 186 U. S. 245.

Doyle v. Continental Insurance Co., 94 U. S. 535.

Cooely's Constitutional Limitations, pp. 540-257, 7th ed.

Sutherland's Statutory Construction, section 496.

The usual notice of the introduction of the bill was given in the state legislature, as appears from the answer of the Hydraulic Company filed.

This notice, as held by the State Supreme Court in *People v. Hulburt, 24 Mich. 441,* nearly forty years ago, was sufficient. Such was the construction of the State Supreme Court, in the case at bar.

If even further notice were necessary it would be presumed.

Speer v. Mayor of Athens, 9 L. R. A. 402.
Cooley on Constitutional Limitations, (7th ed.) p. 193.

The course taken to repeal this special charter of the Hydraulic Company, was that suggested years ago by the Michigan State Supreme Court in *Grand Rapids v. Hydraulic Company, 66 Mich. 16.*

Counsel on page 5 of their brief quote, at length, from the statements of their answer, neither permissible in proof or pleading.

They cite *Stearns v. Minnesota, 179 U. S. 223-259* and quote in part the language of Mr. Justice White.

Justice White in this same case also says, with reference to franchises where the right of repeal or amendment is reserved: "In such cases no irrepealable contract, protected from impairment, under the Constitution of the United States, takes effect, because it is impossible to conceive that contract rights which are conferred, subject to power of repeal, alteration or amendment, are protected from an impairment which under the terms of the grant, the state has reserved a right to make."

Louisville v. Bank of Louisville, 174 U. S. 439-444.
Citizens Saving Bank v. Owensboro, 173, U. S. pp. 636-644.

Another citation in the Stearns case is that of St. Louis Iron Mountain, etc., Railway v. Paul, 173 U. S. 404-409. The

opinion was written by Chief Justice Fuller. Among other things he says "the power to amend cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made," and that rights actually vested cannot be divested. This we concede, and the decisions in the case at bar both in state circuit, and state supreme court, fully recognize this principle.

We print as an appendix ("A") to this brief, for convenient reference, the full order and opinion of the circuit court, affirmed in the state supreme court.

The State in the repeal of the Hydraulic Company's franchises but exercise a right expressly reserved and by a method, under the construction of its highest court of the state's Constitution, and legislation, fully authorized by law.

SUPERSEDEAS.

If, as counsel argue, the writ of error operates as a supersedeas there is no occasion for a further order. The authorities cited by them appear to so hold. If their only object is to stay an execution for costs or order against the officers of the Hydraulic Company, precluding them from acting as a body corporate, until a final decision of this court, there is no occasion for further order.

There is no showing, in the application made, of any action or intention on the part of the Attorney General of Michigan or relators to change the *statu quo*.

From the affidavit attached to plaintiff's application for supersedeas and stay, it would seem that they claimed a right to not only continue the business, as it stood at the time of the adjudication in the state courts, but also to proceed and extend the Company's mains in streets not now occupied by them.

This might result in great damage to the City of Grand

Rapids. For this reason we have attached hereto the affidavit of Samuel A. Freshney, Secretary and General Manager of the Board of Public Works, of this city, Ex. "B" "B", and we have gone outside of what is necessary, in citing a few authorities upon the effect of a supersedeas, and respectfully request that whatever order may be made by this Court, will indicate its limitations. Whatever property rights of plaintiffs' may be vested are fixed, as we understand it, by the investment at the time of the passage of the repealing act.

If such extensions are permissible a very large indemnity bond should be required of plaintiff company.

2 Cyc. 910 lays down the rule as to a supersedeas, citing many cases, that,

> "It does not discharge interlocutory orders made for the preservation of property; it does not discharge from custody a defendant arrested and committed before judgment beyond the time allowed by statute; it does not prevent the prosecution of collateral or independent proceedings."

Wells v. Palmer, 64 Ind. 493, a case cited under the *text 2 Cyc. 908-9*, was where a judgment had been rendered suspending the petitioner from practicing his profession, as an attorney and it was claimed that such appeal had the effect of restoring him to his right to practice during the pendency of the bill. The court held that to give that effect to the appeal, would be to reverse the judgment of the suspension, before the appeal was judicially decided.

> "that the effect of the appeal and supersedeas is to stay the judgment of suspension as it is, and to prevent further proceedings against the petitioner; it does not reverse or suspend the force of the judgment."
> *2 Cyc. 885* in note *67* states the rule
> "it is a suspension of the power of the court below to issue execution of the judgment on decree appealed from, or if a writ of execution has issued, a prohibi-

> tion emanating from the court of appeal against the execution of the writ."
> *Hovey v. McDonald, 109 U. S. 150.*
> *Stafford v. King, 90 Fed. R. 136.*

The case of *Dulin v. Pacific Wood, etc., Co., 98 Cal. 304,* is very clear in language, defining the object and effect of supersedeas. It holds that its limitation to restrain action on the judgment appealed from, cannot be used to perform the function of an injunction against the party to the action restraining them from any act in the assertion of their rights, other than to prevent them from using a process of the trial court to enforce a judgment, and that it could not be employed for any purpose on members not parties to the judgment. It cites *Williams v. Bruffy, 102 U. S. 249, Hovey v. McDonald, supra;* and the case of *Wells v. Palmer, 64 Ind. 496,* to which we have called attention above. It uses this language:

> "the appeal suspends the force as a conclusive determination of the rights of the parties but the stay of proceedings consequent upon the appeal, is limited to the enforcement of the judgment itself, and does not destroy or impair its character."

In *Hovey v. McDonald* this language is used:

> "a supersedeas, properly so-called, is a suspension of the power of the court below to issue an execution on the judgment or decree appealed from; or if a writ of execution has issued, it is a prohibition emanating from the court of appeal against the execution of the writ."

In this case appeal was taken to the Supreme Court of the District of Colo. to restrain McDonald from collecting money and making it subject to his debts. A restraining or peremptory order was made by the court in accordance with the prayer of the appeal.

On the hearing an order was made that the restraining order in both cases be vacated and the injunction granted was modified.

An appeal was taken from such order. On page 161 the court uses this language:

> "This court, in the *Slaughter House Cases, 10 Wall. 273*, decided, that an appeal from a decree granting, refusing or dissolving an injunction, does not disturb its operative effect. Mr. Justice Clifford, delivering the opinion of the court, said "it is quite certain that neither an injunction nor a decree dissolving an injunction passed in a circuit court is reversed or nullified by an appeal or writ of error before the cause is heard in this court;" and held that the same rule applies to writs of error from state courts in equity proceedings; and the decision of the court was based upon that view of the law * * * It was not decided that the court below had no power, if the purpose of justice required it, to order a continuance of the *statu quo* until a decision should be made by the appelate court, or until the court should order the contrary."

Case of *Mabry v. Ross, 1 Heis. (48 Tenn.) 768*, is a very clear statement of the same proposition.

We submit upon plaintiff's own showing,

1st. That no occasion exists for the additional stay ordered.

2nd. That if an additional order is made it should be limited to simply staying proceedings upon the judgment of the state supreme court.

3rd. That if the order extends beyond simply staying the issue of process upon the judgment of the court below, that an additional bond commensurate with possible damages that might result should be required of plaintiffs in error.

Respectfully submitted,

JOHN E. BIRD,
Attorney General of Michigan.
MOSES TAGGART,
GANSON TAGGART,
Counsel.

APPENDIX "A" "A"

THE CIRCUIT COURT FOR THE COUNTY OF KENT.

THE PEOPLE OF THE STATE OF MICHIGAN BY THE ATTORNEY GENERAL AT THE RELATION OF GEORGE E. ELLIS, MOSES TAGGART AND SAMUEL A. FRESHNEY,

Plaintiff,

v.

JOHN F. CALDER, DAVID A. CROW, JOHN E. MORE, THOMAS H. KEOGH AND WILLARD KINGSLEY,

Respondents

The issue joined between the parties to this cause, came on regularly to be heard on the 18th day of March, 1907, before Hon. Willis B. Perkins, one of the judges of said Circuit Court, on an issue of law, framed by an information in the nature of quo warranto, filed by the plaintiff against these respondents in this cause, the respondent's plea thereto, and the plaintiff's demurrer to such plea, to which the respondents joined, Messrs. Moses Taggart and Ganson Taggart appearing as counsel for the plaintiff and Messrs. Kingsley & Wicks and John E. More, Esq., appearing as counsel for the respondents.

Thereupon, the issue of law, so joined as aforesaid, was argued by counsel for the respective parties, before said court on the 18th day of March, on the 25th of March and on the 1st. day of April, 1907, and submitted to the court. Said cause was taken under advisement by said court, but no decision made or judgment rendered thereon until afterwards, to-wit, on the 22nd day of April, 1907, at which time the said

court rendered its opinion and decision in writing, and sustained the said demurrer to the aforesaid plea of the respondents, to which ruling and decision of the court, sustaining said demurrer, counsel for said respondents did then and there except. A copy of which opinion and decision is hereto annexed and marked "Exhibit A" and made a part of this bill of exceptions.

Thereafter, and on the 7th day of May, 1907, said court on motion of counsel for the plaintiff, made and rendered a final judgment in said cause, in favor of said plaintiff and against the said respondents, sustaining plaintiff's demurrer to the aforesaid plea of respondents, and ordering and adjudging that the respondents did not have authority in law to act as a body corporate or exercise the rights, privileges and franchises of a body corporate, and that said respondents be altogether excluded, ousted and prohibited from exercising or assuming to exercise corporate rights, privileges or franchises, or acting or assuming to act as a body corporate and particularly under the name and style of the Grand Rapids Hydraulic Company, and for costs against said respondents to be taxed, the plaintiff to have execution therefor, to which decision of said court in making and rendering said final judgment for the plaintiff, said counsel for the respondents did, on behalf of said respondents, then and there except.

Counsel for respondents did also in behalf of said respondents allege exceptions in writing and file the same with the clerk of the said court.

And thereafter, said judge of said court, at the request of counsel for the respondents, after due notice to the adverse party, the counsel of record for said plaintiff appearing at the time of its settlement, has signed this bill of exceptions this 28th day of June, A. D. 1907.

WILLIS B. PERKINS,
Circuit Judge.

THE CIRCUIT COURT FOR THE COUNTY OF KENT.

JOHN E. BIRD, ATTORNEY GENERAL, EX REL, ETC.,
Relators,

v.

JOHN F. CALDER, ET AL.,
Respondents.

MEMORANDUM OF OPINION.

The information filed in this cause alleges, in substance, that the respondents are assuming to act under the name and style of the Grand Rapids Hydraulic Company as a corporation at the City of Grand Rapids, Michigan, without being a legal corporation, and prays that the respondents show by what warrant they claim to act as a corporation.

The respondents' answer alleges:

(1) That for fifty-seven years under an Act of 1849 the Grand Rapids Hydraulic Company has been in existence; that the president and directors are a coroporation and were elected within the last year; that they are acting rightfully under the present name and style of the Directors of the Hydraulic Company; that David A. Crow ceased to act as such director on the 12th day of December last; that James R. Fitzpatrick took his place. It alleges that the Hydraulic Company was authorized to supply water from springs to the city.

(2) That the city has exercised its authority to extend a municipal system of water works, and that the two are competitors, and refers to the suit instituted by the city reported in 66 Mich. 606.

(3) That an effort was made in the spring of 1905 on the part of the city to crush the Hydraulic Company and take away its franchise by legislative action, without due process of law, and without a hearing; that this was done for the benefit of the municipal treasury and to merge the plant of the company into the public system without just compensation.

(4) That the communication of the Mayor of the City to the common council in March, 1905, recommended the leg-

islature to repeal the Hydraulic Company charter, naming the alleged conspirators and the directing copies of the bill for repeal to be furnished to the representatives of Kent county, which was done; that Representative Ellis and Senator Fyfe were requested to introdue such bill and cause it to be passed without notice to the company; that this constituted a proceeding on the part of the city; that the proposed bill was introduced on the 28th day of March without notice to the Hydraulic Company, and was passed.

(5) That the Hydraulic Company learned that a bill to repeal its charter had been introduced in the legislature; that some of its officers went to Lansing and had an interview with Representative Ellis and Senator Fyfe protesting against the passage of the bill, and requested them to afford the Hydraulic Company an opportunity to be heard on the merits of the bill; that such request was ignored; that the bill was passed by the unanimous consent of the House; that on the same day the same bill was passed in the Senate; that it was customary in the legislature when the members from a district are a unit on pending measure affecting their district for the other members of the legislature to vote for such measure at the request of the members from such local district.

(6) That the passage of the bill was brought about by the statements and representations made by Representative Ellis and Senator Fyfe that it did not involve a subject in which the people of the state of Michigan were interested. It is alleged that the charter was not in its nature a local matter, but a valid and legal contract between the state as one party and the Hydraulic Company as the other; that the members of the legislature outside of those from Kent county relied on the statements and representations from members of the district of Kent county that it was local and voted for the bill without exercising their jugment and discretion on its merits.

(7) That on April 5th T. J .O'Brien, Receiver of the Hydraulic Company, Alfred C. Sekell and Thomas H. Keogh, representing the stockholders and bondholders, appeared at the Governor's room at the capitol building and protested against the approval of the bill; that the same was passed without notice to the Hydraulic Company; that the Mayor of the City, City Attorney and Mr. Brown, a member of the

Board of Public Works, represented that it was legal under the reserved power of the legislature to repeal the charter of the Hydraulic Company, and urged the Governor to approve the bill, which he then did; that the only opportunity the Hydraulic Company or its officers had for a hearing on the bill was that of April 5th, 1905; that the motion of Representative Ellis that the bill be passed was premature and contrary to parliamentary law; that on the 12th day of April Senator Fyfe, previous notice being given under the rule, re-introduced the identical bill, and that it was read a first and second time by its title; that Senator Fyfe moved a suspension of the rules that the bill might be placed on its immediate passage, which motion prevailed; that two-thirds of all the senators elect voted therefor.

(8) That on the following day the bill was received in the House with a message from the secretary of the Senate informing the House that the Senate had passed the bill and ordered the same to take immediate effect, and, thereupon, the same was read a first and second time by its title, and, pending reference to a committee, Representative Ellis moved that rule 46 be suspended and the bill placed on its passage, which motion prevailed; that the bill was read a third time, and passed by a two-thirds vote of the House.

(9) That the last passage of the bill was induced by the reliance of the legislature upon the usage and custom relating to local measures and by the same statements and representations as before made by Representative Ellis and Senator Fyfe, which representations were that it was a local measure, whereas it was a bill involving a subject of general public interest, and intended to revoke an express legal contract.

(10) That the second and last passage of the bill did not receive the real assent of a majority of the members of each house who voted thereon, although they voted yea; that the legislature in compliance with the aforesaid custom relating to local measures, and in reliance upon the aforesaid representations and special request of members from Kent county, voted therefor; that on the 20th day of April said bill so repassed by the legislature was again presented to the Governor, and by him approved on the 25th day of April, 1905, becoming Act 492 of the Local Acts of 1905; that the Hydraulic Com-

pany or its officers had no notice of the contemplated re-introduction and re-passage of the bill.

(11) That the three relators are officers of the City, Mayor, City Attorney and General Manager of the Board of Public Works, and authorized to carry into consummation the designed plan and avowed purpose to put the Hydraulic Company out of business and merge its plant into the City's system; that they induced the Attorney General to institute this proceeding on the ground that it was a subject in which the people of the state of Michigan were interested and not a local measure.

(12) That in order to extend its system and conduct its business the Hydraulic Company in 1886 delivered to the American Loan and Trust Company a valid mortgage on its plant and tangible property and its franchise to own and operate such a plant; that this mortgage was to secure twelve hundred coupon bonds of one thousand dollars each; that the Hydraulic Company issued six hundred and eighty of its coupon bonds and sold them for a consideration not stated, which coupon bonds are outstanding and unpaid, but are legally secured by said mortgage; that the obligations contained in such trust mortgage issued as aforesaid "are safe within the protecting arms of the federal constitution and out of danger from and beyond the reach of either past or future legislative assaults upon them."

(13) That the pretended repeal of the charter of the present directors of the Hydraulic Company is ineffective and does not affect an act entitled "An act to incorporate the Grand Rapids Hydraulic Company, being Act 223 of the laws of Michigan, 1849" and did not repeal or affect the right of the respondents to have acted and still act under the style of the directors of the Grand Rapids Hydraulic Company as a corporation, because such act is non-enforcible, unconstitutional and void; that the reserved right to "amend or repeal" the law of 1849 did not give to the legislature of the state the right to exercise arbitrarily the power used by it in the passage of either of said acts; that such acts are not enforcible.

(14) That such acts are void because

(a) They are in conflict with section 10 of article 1 of

the constitution of the United States which prohibits the impairing of the obligation of contracts.

(b) They are in conflict with the Fourteenth Amendment of the constitution prohibiting the taking of property without due process of law.

(c) They are in conflict with section 16 of article 15 of the present state constitution that notice shall be given to the present directors of any proposed alteration of its charter, which notice should have been given according to Act No. 117 of the laws of 1851.

(d) They are in conflict with section 43 of article 4 of the state constitution prohibiting the impairment of the obligation of contracts.

(e) They are invalid and in conflict with section 32 of article 6 of the state constitution prohibiting the taking of private property without due process of law.

(f) They conflict with section 2 of article 18 of the constitution of the state providing that private property cannot be taken for public uses or benefit unless the necessity is determined by a jury.

(g) They are invalid in that the legislature in passing them did not in good faith exercise its discretion at all, but acted arbitrarily and unreasonably without a hearing and without process.

(h) They are void in that they are declared passed without the real assent of two-thirds of the members elect to each house.

(i) They are, according to the law of the land, invalid and non-inforcible at the instance of relators for the benefit of the City of Grand Rapids; that they were passed at the wrongful instance of the City of Grand Rapids for its selfish and pecuniary advantage, without the president and directors of the Hydraulic Company having reasonable notice thereof, or opportunity to be heard; that the City of Grand Rapids wrongfully induced the legislature to pass said acts and is now attempting by these proceedings to consummate its scheme to crush the Hydraulic Company and merge its plant into the public system.

The respondents pray that it may be adjudged that they are the lawful directors, etc.

Relators demur to said answer for the reasons:

(1) That David A. Crow subsequent to the filing of the information resigned his position as director, and disclaimed the right to exercise any function, for the reason that no respondent can avoid full answer to the charge of the information.

(2) That the allegation of the second paragraph of respondents' plea as to the action of the Hydraulic Company in establishing a water plant, machinery, etc., is irrelevant and immaterial to the questions involved.

(3) That the allegation of the second paragraph is immaterial, superfluous and frivolous and has no proper part or place in a pleading.

(4) That the allegations of the first subdivision of the third paragraph are superfluous and incompetent for any purpose, and that the last subdivision of the third paragraph is of the same character as the first, improper, incompetent, immaterial, irrelevant, superfluous and frivolous.

(5) That the bondholders of the Grand Rapids Hydraulic Company are not before the court and cannot be made parties thereto; that all allegations relating thereto are improper and superfluous; that the allegations of what members of the legislature or others said, when the legislation in question was offered, are incompetent for any purpose, and particularly, to dispute, modify or change the legislative journals.

(6) That what was said or done by O'Brien, the Receiver, is immaterial and incompetent and had no proper place in the answer.

(7) That the allegations as to the bill offered by Senator Fyfe are incomplete, and relators attach hereto full and complete copies from the legislative journals duly certified by the clerks of the House and Senate and make the same a part of the demurrer, and ask that they be considered; that the matter set up in the third paragraph of respondents' plea is superfluous and incompetent.

(8) That all matters set up in the plea or answer other

than those in direct line of justification or attempted justification in anticipation of relators' answer are improperly embodied therein, and for such reason objectionable.

(9) That the allegations of respondents' plea contained in the fourth paragraph as to the mortgage given September 9, 1886, are irrelevant, immaterial and incompetent, and no defense to the information filed, as the franchise by its express terms was subject to repeal, and any trustee or mortgagee took the same subject to notice of such reserved right.

(10) The allegations of the fifth paragraph of respondents' plea are incompetent and insufficient in not showing any right superior to that reserved to the state legislature in the original franchise to repeal such franchise; that such allegations are argumentative and insufficient to change the clear construction of Act 223 of the laws of 1849.

(11) That the plea is defective in substance and form by the attempted setting up of relators' expected reply thereto and averring respondents' erroneous conclusions of law based on such improper and defective averments.

(12) That the allegations of the fifth paragraph of respondents' plea enumerated by letters "a" to "j" are each and every conclusions of law based on alleged facts not shown by official records of legislative proceedings in connection with the repeal of the Hydraulic Company's charter, and have no legitimate part or place in a proper plea to the information filed.

(13) That the said plea is defective and insufficient in all of its parts for divers and sundry other reasons.

To the demurrer is attached copies of the proceedings relating to the passage of the last repealing bill duly certified by the secretary of the Senate and clerk of the House.

The points thus raised by the respondents' answer and the demurrer thereto may be summarized as follows:

(1) The constitutionality of the repealing act of 1905.

(2) The sufficiency of the notice to respondent of an intent to repeal the act of 1849.

(3) Is it permissible to go behind the records of the legislature and inquire into the motives of that body in passing the repealing act of 1905?

The constitutionality of the act is specifically raised by subdivisions a, b, d, e and f of paragraph 14 of the answer, the sufficiency of the notice by subdivision c, and the right to go behind the legislative records by subdivisions g, h and i of the same paragraph.

I.

I am satisfied that the reservation of the right to amend or repeal contained in the Act of 1849 gave to the legislature the undoubted authority to exercise that right at any time thereafter it saw fit. If this is so, it must follow as a logical sequence, that no provision of either the state or federal constitution can be violated by a proper exercise of this right. Both the respondent company and all other persons interested therein, whether stockholders or otherwise, are conclusively bound by the provisions of the Act of 1849, and, having accepted the benefits and privileges bestowed by it, are now estopped from denying the right of the legislature to exercise the authority therein expressly reserved. While the power to alter or amend may not bestow any authority to take away corporate rights which may have become vested under the rights and privileges already granted, still the right to incoroporate is not such a property right as may not be withdrawn under a reservation in the act itself to that effect. Such withdrawal may affect incidentally the otherwise vested rights of the company, but it cannot be treated either as an impairment of the obligation of a contract or the taking of property without due process of law under the constitutional prohibitions referred to.

The rights of the stockholders to the tangible property of the company and rights of the bondholders to their security are, therefore, unaffected by this proceeding, except as they may be incidentally affected by the forfeiture of the company's charter.

II.

No authority has been called to my attention which holds that any other or different notice than the ordinary notice for the presentation and passage of bills by the legislature was required in this case. It is conceded that such usual notice was given, and I think it was sufficient.

III.

The general rule is that unless the legislative journals af-

firmatively show that the constitutional requirements with reference to the passage of any act were not complied with, the act must stand. The presumption is conclusive, unless the fact affirmatively appears to the contrary, that all requirements necessary to make the act legal have been complied with. The journal is the only authority the court can consider. But it is urged that a different rule should be applied in this case. The repeal of this act was clearly within the legislative authority, and I do not think it competent to go behind the records of the journal to inquire into the motives of that body in passing the act in question. I am unable to see in this case the distinction between the legislature as a law-making and as a contract-making body. The rules governing the conclusiveness and legality of its acts are, in my judgment, the same in both cases.

Other questions incidental to the principal questions involved were discussed in their briefs by counsel and at the argument, but I think the determination of the three points as indicated, must determine this controversy and lead to the sustaining of the demurrer filed to the answer herein.

Let an order be entered to this effect.

WILLIS B. PERKINS,
Circuit Judge.

EXHIBIT "B" "B"

SUPREME COURT OF THE UNITED STATES. . .

JOHN F. CALDER, ET AL,
Plaintiff's in Error.
vs.
THE PEOPLE OF THE STATE OF MICHIGAN, EX REL.

October Term, 1908.
Number 513.

Ref'd to
117 N.W.R.
p 31

UNITED STATES OF AMERICA, WESTERN DISTRICT OF MICHIGAN.

State of Michigan, County of Kent, ss.

Samuel A. Freshney being duly sworn, does depose and say, that he is the Secretary and General Manager of the Board of Public Works of the City of Grand Rapids, and as such, it is a part of his duty to look after the public highways in the City of Grand Rapids and whatever utilities may be carried on therein; that he knows the Hydraulic Company and what works it has within said city; that it supplies but a small part of the citizens of Grand Rapids with water and its mains occupy but a small part of the public streets and highways of the city; that it has been commonly reported that said Hydraulic Company

had interested eastern capitalists, who intend to tear up the public streets in the city and place the Company's water mains therein; that if such work should be undertaken and permitted by the courts, and carried on to any considerable extent, thousands of dollars in damages would result, by way of expenses in replacing streets in their present condition and removing such mains, if the decisions of the state courts should be affirmed and the act of the legislature repealing the charter of the Hydraulic Company held valid.

Samuel A. Treadway

Subscribed and sworn to before me this 25th day of November, 1908.

Charles G. Hayden

Notary Public, Kent Co., Mich.
My commission expires July 26th 1910

EXHIBIT "C" "C"

THE PEOPLE OF THE STATE OF MICHIGAN, BY THE ATTORNEY GENERAL, AT THE RELATION OF GEORGE E. ELLIS, MOSES TAGGART AND SAMUEL A. FRESHNEY,

Relators and Appellees,

v.

JOHN F. CALDER, DAVID A. CROW, JOHN E. MORE, THOMAS H. KEOGH AND WILLARD KINGSLEY,

Defendants and Appellants

Filed July 13, 1908.

OPINION FROM WHICH PLAINTIFF IN ERROR APPEALS.

Before Grant, C. J., Blair, Moore, Carpenter and McAlvay J. J.

This is a quo warranto proceeding instituted in the Kent circuit court to test the right of respondents to act as a corporation under the name and style of the Grand Rapids Hydraulic Company. The Grand Rapids Hydraulic Company was incorporated under Act 223 of the Laws of 1849, for the purpose of supplying water for the use of the inhabitants of Grand Rapids. The act contained no limitation upon the life of the corporation save this: It was provided that "the legislature may at any time hereafter amend or repeal this act." In 1905 the legislature exercised this authority, and by Acts No. 455 and No. 492 of the Local Acts of that year repealed said Act No. 223 of the Laws of 1849. At the same time it gave to said company the right to present a claim for the value of its

tangible property to the common council of the city of Grand Rapids.

The question in this case is whether said repealing acts are constitutional. Relators contend that they are. Respondents deny this. The circuit court held that they were constitutional and entered a judgment of ouster against respondents. Respondents bring the case to this court for review. They contend that the repealing acts are unconstitutional for various reasons, which will be considered under the following heads:

1. Motives of the legislators.
2. Notice of hearing.
3. General constitutional objections.
4. Estoppel.
5. Provision for presentation of claims.

Carpenter, J. (After stating the facts).

1. Motives of the legislators.

The respondents admit that more than two-thirds of the members elect to each house voted for the repealing laws in question. They complain because they were denied the right to prove that they so voted without investigating the merits, and "without in fact exercising their judgment and discretion on the merits" in compliance with a custom relating to local measures and in reliance upon the representations of the members of Kent county to the effect "that the delegation from Kent county was a unit in favor of said bill and that it did not involve a subject in which the people of the state of Michigan were interested." We think the ruling complained of was correct. In People v. Gardner, 143 Mich., at p. 108, we quoted with approbation from Cooley's Const. Limit. (74th Ed.) p. 257, as follows:

> "And although it has sometimes been urged at the bar that the courts ought to inquire into the motives of the legislature where fraud and corruption were alleged, and annul their action if the allegation were established,

> the argument has in no case been acceded to by the judiciary, and they have never allowed the inquiry to be entered upon. The reasons are the same here as those which preclude an inquiry into the motives of the governor in the exercise of a discretion vested in him exclusively. He is responsible for his acts in such a case, not to the courts, but to the people."

In this connection we notice the contention of respondent that in repealing that law the legislature must act in good faith. It is sufficient to say that the courts must conclusively presume that the legislature did act in good faith. Under the rule above stated the courts have no authority to investigate that question.

The only cases to which our attention is called which oppose this principle relate to certain proceedings of municipal bodies. The principle of these cases is limited. It does not extend even to legislative action of municipal bodies. It certainly does not apply to this case. This was decided in People v. Gardner, supra.

2. Notice and hearing.

Respondents contend that they were not given the notice and hearing to which they were entitled by Section 16 of Art. 15 of our constitution. That section reads:

> "Previous notice of any application for an alteration of the charter of any corporation shall be given in such manner as may be prescribed by law."

The repealing law was enacted twice by the legislature in 1905. One of these laws is No. 455 of the Local Acts; the other is Act 492. Act No. 455 received the approval of the Governor April 5th, 1905. Act No. 492 received the approval of the Governor April 25th, 1905. It appears from respondent's plea that they had no formal notice of this pending legislation. They did, however, learn of it and were afforded a hearing by the Governor, but were denied a hearing by each

house of the legislature. It also appears by their plea that the bills were introduced by legislators from Kent county who had been requested to take this action by the municipal authorities of the city of Grand Rapids. It also appears that the legislator who introduced the bill had given more than one day's notice of his intention so to do. Each of the acts was passed in due form. Act 492 received a vote of more than two-thirds of the members elect to each house. Under these circumstances were respondents denied any rights given them by Section 16 of Art. 15?

At the first session of the legislature after the constitution of 1850 took effect it passed a law providing for the giving of notice in cases coming under said Sestion 16. That law is found in Sections 8569, 8570 and 8571 of the Comp. Laws of 1897. Of this law it was said by Justice Christiancy in People v. Hulburt, 24 Mich., at p. 54.

> "The effect of this act and of the constitutional provision under which it was framed, would be to justify the legislature in disregarding, and probably—while the act remains in force—to impose upon them the duty to disregard the *application* as such until the proper notice should have been given as provided by the act. It does not, however, operate to restrict the right of the legislature itself to make such amendment as they may think the public interest may require; nor does it restrict the right of any member of either house of introducing a bill for that purpose on giving one day's previous notice of his intention so to do. Nor do we think, as insisted by the counsels for the respondents, that the notice, when given in either house by a member, is by this act required, as in case of an '*application*' in behalf of the corporation or individuals, 'to set forth briefly the nature of the alteration *applied* for.' This provision applies only to cases where alterations are '*applied for*' from *without* the legislature itself, and is coextensive *only* with the provision requiring the publication of the notice of such application. The provision allowing a

member of either house to give one day's notice of the intention to introduce a bill for such purpose was, we think, intended to recognize the almost universal custom of practice in legislative bodies in this country, to require one or more days' notice from a member, of his intention to introduce, or ask leave to introduce, a bill; in which case nothing more than the title or general object of the bill is usually required.

"It is urged that if this be the true construction of the constitution and the act, both may be readily evaded; as it would always be practicable for the corporation to procure some member of the house or senate to give the one day's notice, and to introduce the bill on his own responsibility as a member. This may or may not be true; but if true, it is a difficulty inherent in the nature of the subject itself, and for which the courts cannot provide a remedy. A proper respect for a co-ordinate branch of the government requires us to presume that each member of the legislature acts upon his individual conviction of public duty, and that he will not become the willing instrument of designing parties to enable them to evade the statute or the constitution."

This reasoning, which we thoroughly approve, answers every argument advanced by respondents in support of their claim that they were entitled to notice under Section 16 of Art. 15, above quoted. Perhaps it might also be stated that Section 16 of Art. 15 has no application to a repeal of a charter. There is a distinction between an alteration and repeal. See Yeaton v. Bank of Old Dominion, 21 Gratt. (W. Va.) 593.

3. General constitutional objections.

In the circuit court respondents urged that the repealing act impaired the obligations of the contract between the Hydraulic Company and the state contrary to the provisions of the constitution of the United States; that it deprived the company of its property without due process of law, contrary to the provisions of the constitution of the state of Michigan and

of the Fourteenth Amendment of the constitution of the United States; that it took its private property for public use in contravention of Section 2 of Art. 18 of the constitution of Michigan. In our judgment none of these objections are tenable. The repealing act does not take from the corporation any personal or real property acquired during its legal existence. It does take from it this, and only this: its right to continue to be a corporation. It takes from it no right, franchise or power which does not depend for its existence upon the granting clause of the charter and these it had a legal right to take. Greenwood v. Freight Co., 105 U. S. 21. These rights it obtained from the legislature of the State of Michigan. By its terms the law granting these rights might at any time be repealed by the legislature. The corporation would exist until and only until the legislature appealed the law creating it. The life of the corporation expired, according to the terms of its charter with the repeal of the law. Any argument that the repeal destroyed any constitutional right must rest upon the impossible assumption that the corporation had a legal right to exist for a term longer than that specified in its charter. It had no such right. If authority in support of this reasoning be needed, we think it is found in Greenwood v. Freight Company, supra.

In this connection we consider the claim of respondents that the onstitutional rights of certain holders of bonds of the corporation are impaired by the repealing acts. These holders of bonds are creditors of the corporation who are secured by mortgages upon the corporate property and franchises. We deem it sufficient to say that the franchises mortgaged to secure these bonds was no other than that granted to the corporation. Nor did the mortgage in any way change its effect or lessen the right of the legislature to repeal it at any time. The bondholders acquired no greater rights than the corporation had.

The existence of the bonds secured by the mortgage is therefore an entirely immaterial circumstance and in no way affects the correctness of the foregoing reasoning.

4. Estoppel.

Respondents contend that the repealing acts cannot be enforced because they were passed in consequence of the wrongful conduct of certain officials of the city of Grand Rapids. Whether the principle of estoppel can ever be invoked to prevent the enforcement of a valid legislative enactment we do not decide. We do decide that it cannot be invoked in this case. Here the repealing acts are sought to be enforced not for the benefit of those whose conduct was wrongful, but for the benefit of the entire inhabitants of a great city who were guilty of no wrong. Their right to have the law enforced cannot be affected by the circumstance that some agent of the municipality acted improprely in procuring its enactment .

5. Provision for presentation of claim.

The repealing acts give the corporation the right to present a claim for its tangible property to the common council of the city of Grand Rapids. It is contended that this provision is unconstitutional because (a) it permits property to be taken for the public without the determination of necessity as provided in the constitution; and (b) that the compensation provided therein is unlawful and inadequate. It is a sufficient answer to each of these claims to say that this provision is not compulsory. It has no force unless the corporation chooses to accept it. If the corporation does accept, it voluntarily sells its property on the terms stated in said provision. To this there is no constitutional objection.

It results from this reasoning that the judgment of the circuit court must be affirmed.

Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 240.

JOHN F. CALDER, DAVID A. CROW, JOHN E. MORE, THOMAS H. KEOGH, and WILLARD KINGSLEY,
Plaintiffs in Error,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN, by the Attorney-General, at the relation of GEORGE E. ELLIS, MOSES TAGGART and SAMUEL A. FRESHNEY.

This case is a writ of error to the supreme court of the state of Michigan to review its judgment in *quo warranto* proceedings ousting a water supply company from Grand Rapids, in that state, on the ground that its special charter had been properly repealed by the legislature. The case is reported in 153 Michigan 724.

Statement of Case.

These proceedings were begun in Michigan in the Kent circuit court, against the directors of the Hydraulic Company, by the attorney-general, at the instance of three relators, all of whom were officials of the city of Grand Rapids, Kent county, Michigan; one was its mayor, the second, its city attorney, and the third, the general manager

of the public water works. (R. 10). The subject of inquiry in this case is whether the acts of the legislature of the state of Michigan pretending to repeal the special charter of the Hydraulic Company, granted in 1849, violate provisions of the federal constitution. The two questions of a federal nature that are raised in this record are, (1) whether the repealing acts violate the constitution of the United States by impairing the obligation of a charter-contract between the state and the private waterworks company; and (2) whether they also violate the Fourteenth Amendment of the constitution by depriving the water supply company of its property without due process of law. (R. 11).

The Hydraulic Company.

It was established more than half a century ago; it was performing its duty, working night and day, before Grand Rapids had a city charter. It was incorporated in 1849 by a special act, giving it a charter in perpetuity, with a reserved right to repeal. (R. 4). A copy of this act, No. 223, Laws of 1849, is hereto annexed, marked "Exhibit A."

It claims no special privileges or exclusive rights; its business has been continued in open and sharp competition with the municipal system; the mains and pipes of the two systems parallel each other in the principal streets of the city. (R. 5). But the quality of the water furnished by the two systems is radically different; the private plant pumps only pure spring water, while the city plant pumps water which is not good for domestic use. The legislature, to make sure that impure river water should not be pumped by the Hydraulic Company, provided by section 5 of its charter that its supply of water "shall be obtained from the springs of water in and about said village; from Coldbrook; from the lake or lakes, from which it has its source, or from either of them, and from no other source."

In 1886, the city undertook through court proceedings, to stop the Hydraulic Company from doing business. In that suit, Mr. Justice Campbell said, the "Company was required by its charter to bring its waters from such

sources as would make it likely to be wholesome, and that it was confined in its uses to a fire-supply, and to ordinary private uses. The city is not limited either as to quality or uses. It appears also, as a matter of fact, that the quality of defendant's supply is excellent, and that the city supply is not of good quality for domestic use. It is manifest that, if defendant is required to quit business, the results will be disastrous to private health and comfort now, whatever they may be in the future. (R. 5). (City of Grand Rapids v. The Grand Rapids Hydraulic Company, 66 Mich., 606.)

The Pleadings.

First: The information in this case, in the nature of *quo warranto,* was brought by the atorney-general, upon the relation of three officials of the city, against the five directors of the Hydraulic Company. It was brief and general; it did not mention the special charter of the company, nor even allude to the so-called repealing acts of 1905. (R. 1). The relators were Mayor Ellis, City Attorney Taggart and Mr. Freshney, general manager of the city water works. The following is a copy of the information: (R. 1).

> "State of Michigan. In the Circuit Court, County of Kent.—ss.
>
> John E. Bird, attorney-general of the state of Michigan, on the relation of George E. Ellis, Samuel A. Freshney and Moses Taggart, comes into said circuit court for the county of Kent, according to the statute in such case made and provided, and gives the court here to understand and be informed that John F. Calder, David A. Crow, John E. More, Thomas H. Keogh and Willard Kingsley, of the city of Grand Rapids, county of Kent and state of Michigan, for the space of, to-wit, twenty days last past, have acted and still do act under the name and style of the Grand Rapids Hydraulic Company, as a corporation within this state, to-wit, at said city of Grand Rapids and elsewhere, without then and there being legally incorporated, in contempt of the people of the state of Michigan, and to their great damage

and prejudice. Wherefore the said attorney-general prays for due process of law against the said John F. Calder, David A. Crow, John E. More, Thomas Keogh and Willard Kingsley in this behalf to be made to answer to the said people by what warrant they claim to act as a corporation as aforesaid.

JOHN E. BIRD,
Attorney-General,
Lansing, Michigan.
MOSES TAGGART, GANSON TAGGART,
Of Counsel,
Grand Rapids, Michigan."

Second: The five directors, or respondents, filed a joint plea in the nature of a general answer to this information; it contains five paragraphs and covers nine pages in the printed record. (R. 4 to 12). It states, among other things, that the action of the legislature was arbitrary and capricious, violating the obligations of a charter-contract, and in conflict with the Fourteenth Amendment of the constitution. (R. 5, 6, 11). It negatives the presumption that the legislature acted fairly or for the common good. The form of this joint plea, or answer, departs, in a measure, from the narrow form of a strict common law plea, in *quo warranto,* in this: the present plea is not limited or confined to the statement of one single fact as a complete justification, but, because of a special rule of court which was adopted to prevent delays in arriving at an issue under the old common law system, this plea, by good allegations, and in accordance with the practice in the state of Michigan, properly anticipated the fact that the two so-called repealing acts of 1905 would necessarily be relied upon by the relators in their replication, therefore, those acts were set forth in the plea or answer, which alleged they are inoperative and void, because of the particular countervailing facts appearing in the plea. (R. 7, 8, 9, 10, 11). The common law rule, relating to the form of a plea in *quo warranto* proceedings, is not now in vogue in Michigan, under the established practice in that state. (Swart v. Circuit Judge, 119 Mich. 598). The form of our plea, therefore, was in the nature of an answer, a replication to

which would put in issue all the matters of difference between the parties. It is true, that several distinct facts are set up in the plea or answer, but they are all aimed to make out the ultimate fact, namely: the invalidity of the so-called repealing acts. This affords no ground for charging the plea with duplicity. (Coon v. Plymouth Plank Road Co., 31 Mich. 178)

The Plea.

The plea states that at the time of the exhibiting of the information there was, and for upwards of fifty-seven years there had been, in the city of Grand Rapids, Michigan, a water supply company, duly incorporated pursuant to an act of the legislature of the state of Michigan, passed on the second day of April, 1849, entitled, "An Act to Incorporate the Grand Rapids Hydraulic Company;" that act appears as act No. 223 of the laws of Michigan, of 1849, on pages 298 to 304. (R. 4); that since that time the president and directors of the Grand Rapids Hydraulic Company have been and now are a corporation, having its office and place of business in the city of Grand Rapids; that the act incorporating the president and directors of the Grand Rapids Hydraulic Company in 1849 is still in full force and unrepealed, and that the five respondents are the lawful directors thereof. (R. 4).

The Hydraulic Company was duly authorized to supply water from springs, from Coldbrook and the lakes from which this brook had its source, with power to lay pipes, make reservoirs, and do all necessary things to enable it to carry on the business of supplying and distributing pure and wholesome water for household and domestic uses in Grand Rapids, and, also, to supply water for the extinguishment of fires. Pursuant to such authority, the Hydraulic Company, soon after it was incorporated, constructed and put into operation a water supply plant and has, from time to time extended it; and it has an excellent supply of water drawn from springs, located outside the corporate limits of the city; it has modern pumps, engines of the latest design; many miles of iron mains and pipe lines, properly connected with buildings; it has a large number of con-

sumers, paying agreed rates for water supplied by it to them. (R. 5).

The city of Grand Rapids was expressly authorized in 1872 to construct a municipal system of water works for the purpose of supplying the city with water for domestic and other purposes; the city works were shortly thereafter built and, from time to time, extended and improved, at an outlay of many hundred thousands of dollars; that the Hydraulic Company and the city have been engaged in sharp competition in the water supply business; that the main and pipes of the two systems parallel each other in some of the principal streets. (R. 5). Owing to this competition the city, in October, 1886, filed a bill in chancery against the Hydraulic Company, for the purpose of obtaining an injunction against the Hydraulic Company from further operating its then existing plant or extending it, in the future, to which bill the Hydraulic Company filed an answer. Voluminous proofs were taken and the supreme court, on an appeal, adjudicated in July, 1887, as reported in 66 Michigan, 606, that the municipality had not made out a case for relief. (R. 5). It was also held in that case: "It appears also, as a matter of fact, that the quality of defendant's (Hydraulic) supply is excellent, and that the city supply is not of good quality for domestic use. It is manifest that, if defendant is required to quit business, the results will be disastrous to private health and comfort now, whatever they may be in the future." (City of Grand Rapids v. Grand Rapids Hydraulic Company, 66 Mich., 606, 609).

The plea then avers, that the city, not being content with the enjoyment of its own rights, did, in the spring of 1905, through its mayor and the common council, together with other of its officers, representatives and agents, carefully plan an effort to crush the Hydraulic Company and take away all of its franchises by legislative action, without notice or process and without hearing, for the benefit of the municipal treasury, and merge the plant of the company into the public system without paying just compensation to the Hydraulic Company. (R. 5, 6). The repealing acts were, as a matter of fact, passed by the legislature of the state of Michigan at the wrongful in-

stance of the city of Grand Rapids for its own selfish and pecuniary advantage, without the Hydraulic Company having any opportunity to be heard. (R. 12).

This designed scheme, according to the plea, was carried out in the following mode and manner: (R. 6 to 10).

A communication was made by the mayor of the city to the common council on March 20, 1905, recommending that the legislature be induced to repeal, without delay, the Hydraulic charter, whereupon the city attorney was instructed to draw a bill in accordance with the recommendation of the mayor; a copy of the bill was to be furnished, *not* to the Hydraulic Company, but only to the senators and representatives from the local district. This bill for the repeal of the charter of the Hydraulic Company was delivered to the members of the local delegation then in the legislature; the city attorney, acting in his official capacity, and also for and in behalf of the mayor and common council of the city, urged and requested Representative Ellis and Senator Fyfe, and other members of the local delegation, to introduce such bill at once, and if possible, cause it to be passed immediately, without notice to the Hydraulic Company. Whereupon Representative Ellis, in part execution of the scheme and complying with such unreasonable requests of the mayor, common council and city attorney, on the 28th day of March, 1905, without giving any notice whatever to the said Hydraulic Company, its officers or agents, did introduce the bill into the house, then moved a suspension of the rules of the house and the passage of the bill at once, without having it referred to any committee and without giving the Hydraulic Company any opportunity to be heard on the merits thereof. The bill was then read the first and second times by its title, when Representative Ellis again moved that the rules be suspended and the bill be placed on its immediate passage. This motion prevailed, and the bill was then read a third time and the question being on its passage, a motion was made that the bill be laid on the table, which motion was carried.

That on the evening of that day the officers of the Hydraulic Company learned for the first time, from outside sources, that a bill to repeal its charter had that day

been introduced into the legislature; on the next morning the vice-president and secretary of the Hydraulic Company, and another, who represented several non-resident stockholders in, and bondholders of, the Hydraulic Company, went to Lansing, where they had separate interviews at the capitol building with Representative Ellis and Senator Fyfe, before the legislative session began; they then and there protested to them against the passage of said bill in the mode and manner contemplated; they then and there with insistency, requested the said senator and representative to afford the Hydraulic Company a fair opportunity to be heard on the merits of the bill, but this protest was relentlessly rejected and absolutely refused by both Representative Ellis and Senator Fyfe, who, at the capitol building, then and there had charge of this measure pending in the legislature. On the same day, being the one following the introduction of the bill, by unanimous consent the bill was taken from the table and passed at once by the house without reference to a committee and without debate. On the same day Senator Fyfe moved in the senate, that its rules be suspended and the bill be placed on its immediate passage, which motion prevailed.

It was then an established custom in the legislature of Michigan when the members from a particular district were a "unit" on a pending measure affecting only their own district and not the people of the state generally, for all other members of the legislature to vote for such pending local measure at the request of the members from such local district, expressed through their representatives and senators, having the bill in charge, without investigating the merits of the measure and without, in fact, exercising their judgment or discretion at all. The plea alleges the passage of the bill was brought about by the statements and representations made by said Representative Ellis and Senator Fyfe, having the measure in charge, that the delegation from Kent county was a "unit" in favor of the bill; that it did not involve a subject in which the people of the state of Michigan were interested, whereas, in point of fact, the charter so attempted to be repealed was *not* in its nature a mere local matter nor a contract between the city of Grand Rapids and the Hydraulic Company, but

on the contrary, was a valid existing contract between the state of Michigan and the Hydraulic Company. The members of the legislature outside of Kent county relied upon these representations and statements and voted for the bill as aforesaid without in fact exercising their judgment or discretion at all upon the merits of the so-called local measure.

Shortly after the passing of the bill, agents of the Hydraulic Company appeared in the governor's room at the capitol building, and protested against his approval of the bill so passed, on the ground, among others, that said bill was confiscatory in its nature, but the mayor of the city represented in behalf of such municipality that it was legal under the reserved power of the legislature, to repeal the special charter of the Hydraulic Company, for the governor to then and there approve said bill. The governor, complying with such unreasonable statements and requests, approved the bill.

It was soon discovered the motion of Representative Ellis, that the bill be passed with such speed, was premature and contrary to the rules and parliamentary law of the house itself; such unallowable and unprecedented speeding of the bill through the legislature, caused it to be again brought before that body and re-passed in the following manner: On the 12th day of April, 1905, Senator Fyfe, previous notice under the rules having been given and leave granted, re-introduced the identical bill hereinbefore referred to; it was read a first and second time by its title and pending reference to a committee, Senator Fyfe moved a suspension of the rules and that the bill be placed on its immediate passage, which motion prevailed. It was then read a third time and without reference to a committee or any debate whatever, passed, according to the established "unit" custom before mentioned. On the following day, the bill was received in the house; thereupon the bill was read a first and second time by its title and pending its reference to a committee, Representative Ellis moved the rules be suspended; that the bill be placed upon its immediate passage; the bill was then read a third time and without debate passed, according to the established "unit" custom concerning local measures.

The last passage of the bill by the senate and the house was induced by the reliance of the legislature upon the usage and established custom relating to purely local measures and by the statements and representations made to the senate and house by Senator Fyfe and Representative Ellis, upon which the members of the legislature relied, and which were in substance, the same as those made on the first passage of the bill and which were to the effect that the members of the local delegation were a "unit" in favor of the passage of the bill; that it did not involve a subject in which the people of the state at large were interested, but was in its nature a local measure, confined in effect to the city of Grand Rapids; whereas, in fact, it was a bill involving a general public question and intended to revoke an express legal contract entered into by the people of the state on the one hand and the Hydraulic Company on the other. The last passage of the bill did not receive the real assent of a majority of the members of each house who were present and voted; for, although they in form voted yea, nevertheless they did so nominally and as a mere form, but not otherwise; they voted yea, as aforesaid, in compliance with the established custom relating to local measures and reliance upon the aforesaid representations and at the special request of the members of the legislature from Kent county, expressed through Representative Ellis and Senator Fyfe, both of Grand Rapids.

It is averred as a fact, that neither the Hydraulic Company, nor any of its officers or agents, had any notice of a contemplated reintroduction and repassage of the bill, nor did the Hydraulic Company have any opportunity to be heard, either in the senate or the house, on the merits thereof. Copies of the repealing acts are hereto annexed and marked "Exhibit B."

The plea alleges, that the three relators are officers of the city, George E. Ellis being its present mayor, Moses Taggart was and still is city attorney, and Samuel A. Freshney was and is the general manager of the city water works; they were the authorized agents of the municipality to assist in carrying to consummation the aforesaid designed plan and avowed policy of the city to put the Hydraulic Company out of business and merge its plant into the city

system; that as such representatives and agents, they induced Attorney-General Bird to begin these proceedings on the ground that the subject involved was one in which the people of the state of Michigan were interested, and that it was not a local question, nor did it involve a mere matter of local concern. (R. 10).

The plea then asserts the acts and each of them, are non-enforceable, unconstitutional and void, and the power reserved in the charter to repeal the same did not give to the legislature the right to exercise the arbitrary power used by it in the passage of either of said acts; they are non-enforceable, invalid and void for the reasons that: (R. 11).

(*a*) Each of said acts is in conflict with § 10 of Article I of the constitution of the United States prohibiting the state from passing any law impairing the obligation of contracts.

(*b*) Each of said acts is in conflict with the Fourteenth Amendmend of the constitution of the United States prohibiting the state from making or enforcing any law depriving any person of property without due process of law.

(*c*) Each of said acts, according to the law of the land, is invalid and non-enforceable at the instance of these relators for the benefit of the city of Grand Rapids. Each of said acts was, as a matter of fact, passed by the legislature of the state of Michigan, at the wrongful instance of the city of Grand Rapids for its own selfish and pecuniary advantage, without the president and directors of the Grand Rapids Hydraulic Company having either reasonable notice or a fair opportunity to be heard on the merits of the bill. The city of Grand Rapids, as a matter of fact, wrongfully induced the legislature to pass each of said acts. It is now attempting by these proceedings to consummate its aforesaid scheme to crush the Hydraulic Company and merge its plant into the public system, thereby attempting to take advantage of its own wrong.

Coupon-Bonds and Mortgage of Franchise.

It is alleged in the plea that in order to extend its system and conduct its business, the Hydraulic Company,

on the 9th day of September, 1886, executed and delivered to the American Loan and Trust Company, of Boston, Massachusetts, as trustee, a valid trust mortgage on its plant and other tangible property, and also, included in said trust mortgage its franchise to own and operate a water supply plant for distributing water as aforesaid. This trust mortgage was made for the purpose of securing a series of 1,200 coupon-bonds of the Hydraulic Company of the face value of $1,000 each. The Hydraulic Company, within a short time after the execution of the trust mortgage, issued 680 of its coupon-bonds, so secured by the trust mortgage on its water supply plant and its franchises, and sold or pledged them in the open market for valuable consideration to *bona fide* purchasers, in the regular course of business; all of which bonds are now outstanding and unpaid, but legally secured by the aforesaid mortgage, which also remains in full force and undischarged. (R. 10).

Demurrer, Joinder and Judgment of Ouster.

The attorney-general filed a special demurrer to this plea and the respondents a joinder in demurrer. (R. 13, 14, 19). The trial court sustained the demurrer and rendered a judgment of ouster, (R. 21) which was sustained by the supreme court. (R. 43). The opinion of the trial court will be found on pages 28 to 34 of the record; the opinion of the supreme court appearing in full on pages 38 to 42 of the transcript of record now before this court. We wish only to quote two sentences, on jurisdictional points, from the opinion of the state supreme court, rendered by Judge Carpenter: (1) "In the circuit court respondents urged that the repealing act impaired the obligations of the contract between the Hydraulic Company and the state, contrary to the provisions of the constitution of the United States;" (2) "That it deprived the company of its property without due process of law, contrary to the provisions of the constitution of the state of Michigan, and of the Fourteenth Amendment of the constitution of the United States." (R. 41).

Assignments of Error.

The separate and particular errors hereby asserted and urged are:

First: That by the record aforesaid it appears that the judgment in form aforesaid was given for the said defendant in error against the said plaintiffs in error, whereas by the law of the land the said judgment ought to have been given for the plaintiffs in error, against the said defendant in error, for the reason that said record shows an existing franchise and charter under which said plaintiffs in error were acting rightfully, with sufficient authority to act as lawful directors of the Grand Rapids Hydraulic Company as an existing corporation in the state of Michigan.

Second: Said court erred in this, in deciding " that the courts must conclusively presume that the legislature did act in good faith. Under the rule above stated the courts have no authority to investigate that question."

Third: That the court erred in holding and deciding that the so-called repealing acts numbered respectively 455 and 492 of the local acts of 1905 of the legislature of the state of Michigan were valid.

Fourth: That the court erred in holding and deciding that act No. 455 of the local acts of 1905 of the legislature of the state of Michigan was valid.

Fifth: That the court erred in holding and deciding that act No. 492 of the local acts of 1905 of the legislature of the state of Michigan was valid.

Sixth: That the court erred in holding and deciding, as appears from the written opinion of said court, as follows:

" In the circuit court respondents urged that the repealing act impaired the obligations of the contract between the Hydraulic Company and the state contrary to the provisions of the constitution of the United States; that it deprived the company of its property without due process of law contrary to the provision of the constitution of Michigan and of the XIV Amendment of the constitution of the United States; that it took its private property for public use in contravention of Section 2 of Article XVIII of the consti-

tution of Michigan. In our judgment none of these objections are tenable. The repealing act does not take from the corporation any personal or real property acquired during its legal existence. It does take from it this, and only this: its right to continue to be a corporation. It takes from it no right, franchise or power which does not depend for its existence upon the granting clause of the charter, and these it had a legal right to take. Greenwood v. Freight Company, 105 U. S. 21. These rights it obtained from the legislature of the state of Michigan. By its terms the law granting these rights might at any time be repealed by the legislature. The corporation would exist until and only until the legislature repealed the law creating it. The life of the corporation expired according to the terms of its charter with the repeal of the law. Any argument that the repeal destroyed any constitutional right must rest upon the impossible assumption that the corporation had a legal right to exist for a term longer than that specified in its charter. It had no such right."

Seventh: The said court erred in holding and deciding that the said so-called repealing acts numbered respectively 455 and 492 of the local acts of 1905 of the legislature of the state of Michigan, and each of them, were valid and not in conflict with Section 10 of Article 1 of the constitution of the United States providing that no state shall pass any law impairing the obligation of contracts.

Eighth: The said court erred in holding and deciding that the said so-called repealing acts numbered respectively 455 and 492 of the local acts of 1905 of the legislature of the state of Michigan, and each of them, were valid and not in conflict with the Fourteenth Amendment of the constitution of the United States providing that no state shall pass any law depriving any person of property without due process of law.

Ninth: That the said court erred in holding and deciding as appears from the written opinion of said court that the constitutional rights of certain holders of the bonds of the Grand Rapids Hydraulic Company were not impaired by the repealing acts:

" These holders of bonds are creditors of the corporation who are secured by mortgages upon the corporate property

and franchises. We deem it sufficient to say that the franchise mortgaged to secure these bonds was no other than that granted to the corporation. Nor did the mortgage in any way change its effect or lessen the right of the legislature to repeal it at any time. The bondholders acquired no greater rights than the corporation had. The existence of the bonds secured by the mortgage is therefore an entirely immaterial circumstance and in no way affects the correctness of the foregoing reasoning."

There are nine assignments of error in the record before this court, but they may be classified under two heads: (a) That the action of the legislature was arbitrary and violated the obligation of the charter-contract; (b) That the action of the legislature was capricious, oppressive and in conflict with the Fourteenth Amendment, regarding the taking of property without due process of law.

ARGUMENT FOR PLAINTIFFS IN ERROR.

The Reserved Power to Repeal.

This charter contained a reserved power clause which reads:

"The legislature may at any time hereafter amend or repeal this act." Laws of Michigan, 1849, p. 298, 304.

The above section, also, contains the provision, that the company shall be subject to the restrictions mentioned in chapter 55 of the Revised Statutes of 1846, so far as the same are not inconsistent with the special incorporating act.

This section 20 of chapter 55 of the Revised Statutes of 1846, (p. 213) reads as follows:

> "Every act of incorporation passed since the twentieth day of April, in the year one thousand eight hundred and thirty-nine, or which shall be hereafter passed, shall, at any time, be subject to amendment, alteration, or repeal, at the pleasure of the legislature: Provided, that no act of incorporation shall be repealed, unless for some violation of

its charter or other default, when such charter shall contain an express provision limiting the duration of the same."

This section 20 of chapter 55 of the Revised Statutes of 1846 providing for the reserved right to repeal every act of incorporation passed since 1839, " at the pleasure of the legislature," cannot be read into the Hydraulic charter, for that, upon its face, says, no part of said chapter 55 shall be read into the special act of 1849 if " inconsistent " with it. These specific words, " at the pleasure of the legislature," are very significant, giving the legislative body, when acting in good faith, a very wide discretion on the subject of repeal. But this special Hydraulic act of 1849 intentionally omitted these significant and special words, " at the pleasure of the legislature," and substituted therefor the general limited reservation: " The legislature may at any time hereafter amend or repeal this act," so the significant words, " at the pleasure of the legislature," were expressly and intentionally omitted from the general reserved power clause contained in the Hydraulic charter of 1849. The adoption of this form excludes the other statutory one. It was ruled in New Jersey v. Yard, 95 United States, 104, that a former statute of New Jersey, providing that charters might be revoked in the discretion of the legislature, could not by implication, be read into a subsequent act with an inconsistent reservation, creating a corporation by the name of Morris & Essex Railroad, because the former legislature could not bind the subsequent one concerning the terms and conditions of a new legislative contract.

The case of Greenwood v. Freight Company, 105 United States 13, was a case coming from Massachusetts. The general statutes of that state contain a provision that every act of incorporation passed after 1831, shall be subject to amendment or repeal " at the pleasure of the legislature." The court said, in speaking of this particular phrase, that it would be difficult to supply language more comprehensive or expressive than this, and further, that under this particular phrase, the legislature need give no reason for its action in the matter, because the quoted expression, as the court said, " is significant, and is not found in many of the similar statutes of other states " but had been the law of

Massachusetts for fifty years before the incorporation of the company then before the court.

It will be noticed, in this Greenwood v. Freight Company case, the court based its decision on the power of the legislature of Massachusetts to repeal that particular street railway franchise, under the circumstances there appearing, solely and exclusively upon the peculiar and expressive language used in the general statutes of the state, which, by implication, became part of that particular legislative contract with the street railway company, which contract, on its face, was silent on the subject of reserved legislative power to alter or repeal. In the case at bar, the only reserved power of the legislature to repeal the Hydraulic charter is found exclusively on the face of the special act incorporating the company. This expressly covers the extent of this reserved power, and thereby excludes the idea that the legislature, also, had a further special reserved power to act at its pleasure.

The distinction between a reserved power to alter or repeal, " at the pleasure of the legislature," as in the Greenwood v. Freight Company case, and the general reserved right to alter, amend or repeal without any qualifying words, is well illustrated by comparing this Greenwood case with the case of Lake Shore Railway Company v. Smith, 173 United States, 684, 698 (mid.)

Another illustration showing the difference between a special pleasure clause and a general clause will be found in the important case of Berger v. U. S. Steel Corporation, 63 New Jersey Equity, 809 (1902) ; it appeared that the reserved power clause in an old act of New Jersey of 1846 was that: " The charter of every corporation which shall hereafter be granted by the legislature, shall be subject to alteration, suspension and repeal, in the discretion of the legislature." The U. S. Steel Company was organized under the general act of New Jersey of 1896, which expressly re-enacted the language of the old act of 1846, and then went further by adding to such phraseology these words: " This act may be amended or repealed at the pleasure of the legislature, and every corporation created under this act shall be bound by such amendment." The court of appeals held, that this reserved pleasure clause in the act of 1896 was broader

in its scope than the discretion clause in the corporation act of 1846. The court said the pleasure clause in the corporation act was "designed to amplify and enlarge the power of the legislature." But, even under the pleasure clause, though no special reason need be given, yet good faith must be exercised, for in law, "at pleasure" does not mean gratification over an arbitrary and willful act, but rather the satisfaction of the mind in doing something good. "At pleasure" does not mean the pleasure of lawlessness, but of reasonable authority.

The usual reserved power to amend or repeal private charters, no matter in what language expressed, is not an unlimited one, but, on the contrary, is encircled by constitutional limitations. Legislatures cannot, under such reservation clauses, act regardless of the rights of others; they must act with some degree of moderation, paying respect to the facts of each particular case; they must, at least, act in good faith. This court has expressed its opinion on that point and held that where a legislature had reserved a broad right to amend or repeal, the exercise by a future legislature of such reserved power, is not without limit. Sheer oppression and wrong cannot be inflicted and the legislature, acting under reserved power, must do so in good faith. (Shields v. Ohio, 95 U. S. 319, 324-325).

In the Sinking-Fund Cases, 99 U. S. 700, 721, this court quoted the above language from the Shields case, with approval, Mr. Chief Justice Waite saying: "The rules as here laid down are fully sustained by authority. Further citations are unnecessary."

Again, this court has said: "It has been * * * * * * * determined that the reserved right to repeal, alter or amend does not confer mere arbitrary power, and cannot be so exercised as to violate fundamental principles of justice by depriving of the equal protection of the laws or of the constitutional guarantee against the taking of property without due process of law." (Stearns v. Minnesota, 179 U. S. 223, 259,) (1900). Judge Cooley says in his "Constitutional Limitations" (7th ed. p. 394, note 1): "Respecting the power to amend or repeal corporate grants, some troublesome questions are likely to arise which have only as yet been hinted at in the decided cases."

In the case of San Joaquin Company v. Stanislaus County, 113 Federal, 930 (1902), it was held that the reserved power is subordinate to, and limited by the federal constitution, and that a state legislature, acting under a reserved power cannot arbitrarily destroy the corporation, for the reserved power of alteration, amendment and repeal is not without limit. In McKee v. Chautauqua Assembly, 130 Federal, 536 (1904), the circpit court of appeals, sitting in New York, held that the reserved power to alter, amend or repeal the charter confers " exceedingly wide discretion upon the legislature, but it is not without limits."

The state courts have indorsed the same rule; thus it is held in Delaware that the legislature, acting under the reserved power, cannot arbitrarily revoke a charter from whim or caprice. (Delaware R. R. Co. v. Tharp, 5 Harrington, 454, 456. The court of appeals of New York, in Mayor v. Twenty-third Street Railway, 113 New York, 317, said: " It is difficult to put precise limits upon the power of the legislature thus reserved, over corporations created by it, or under its authority." In Berger v. U. S. Steel Corporation, 63 New Jersey Equity, 809, 827, the court of appeals of New Jersey said, in 1902: "It is unnecessary, however, to determine, in this case, what the true limitation upon the legislative power is, where the boundry line is which cannot be overstepped. The law upon this subject, which is of great moment, is, as yet, in a formative state; a general rule upon a subject of so wide a range can be implanted in our jurisprudence only by gradual development, as questions arise for adjudication. * * * * * * * * Undoubtedly there may be changes so radical that underlying and fundamental principles will not permit the legislature to reserve to itself a right to make them." In Portland & Rochester R. R. v. Inhabitants of Deering, 78 Maine, 61, the court said, it is impossible to lay down an exact rule for the reason that " each case depends largely upon its peculiar facts."

But futher, Michigan has spoken with manlike sturdiness on the merits, for in Detroit v. Detroit & Howell Plank Road Company, (1880), 43 Michigan, 140, it is held, that this reserved right can only be exercised subject to the law of the land, and in that case, the state undertook to remove a toll gate within the city of Detroit, thus depriving the

Plank Road Company of its tolls for travel and traffic on these two and a half miles of road. In that case Judge Cooley said (p. 148): "A statute which could have this effect would not be a statute to amend franchises, but a statute to confiscate property; it would not be a statute of regulation, but of spoliation." Judge Cooley further says (p. 147): "There is no well considered case in which it has been held that the legislature, under its power to amend a charter, might take from the corporation any of its substantial property or property rights." The highest conception of the state is to regard it as the embodiment of justice. The principle of justice and enlightened morality is, to the honor of the state of Michigan, nowhere more fully recognized than in this judgment of its highest judicial tribunal.

Presumption of Validity of the Repealing Acts.

There is a recognized distinction between the actions or functions of a legislature. Generally it is a law maker, sometimes it is only a contract maker. Mr. Justice Miller stated, that the principal function of a legislative body is not to make contracts, but to make laws. These laws, when put into form, are called statutes, and unless forbidden by some exceptional constitutional provision, the same authority which can make a law can repeal it. But, the state often becomes a contracting party to what Mr. Justice Miller terms "a legislative contract," and says that "it has become the established law of this court that a legislative enactment, in the ordinary form of a statute, may contain provisions which, when accepted as the basis of action by individuals or corporations, become contracts between them and the state within the protection of the clause referred to of the federal constitution." New Jersey v. Yard, 95 U. S. 104, 114.

The case at bar does not relate to the functions of the legislature to repeal laws. The subject matter of this particular case relates only to the exercise by the legislature of the limited reserved power to revoke its own contract. It must act within the spirit and intent of the contract itself. Of course, the legislature, on its own motion, if acting in good faith, could repeal this special charter. The courts, in the first instance, would presume such repealing

act valid. In determining whether the legislature, in passing the repealing acts now before this court overran the limits of its constitutional authority, every *reasonable* presumption will be indulged in favor of the validity of these enactments. Where an act of the legislature, on its face, repeals the charter of a private corporation and it is specifically charged, the legislative body acted arbitrarily or capriciously, we think that this court will examine into the facts back of the face of a repealing act and also consider whether the mode adopted by the legislature was suitable to the nature of the case. The court will make all *reasonable*, but not violent presumptions, in favor of the validity of such state statute. The killing of the corporation by the legislature is not a trivial action. In People v. The North River Sugar Refining Co., 121 New York, 582, the court of appeals said, (p. 608):

> "The judgment sought against the defendant is one of corporate death. The state, which created, asks us to destroy; and the penalty invoked represents the extreme rigor of the law. Its infliction must rest upon grave cause, and be warranted by material misconduct. The life of a corporation is indeed less than that of the humblest citizen, and yet it envelopes great accumulations of property, moves and carries in large volume the business and enterprise of the people, and may not be destroyed without clear and abundant reason. *That would be true even if the legislature should debate the destruction of the corporate life by a repeal of the corporate charter.*"

The pretended repeal must be regarded in this court as valid, unless it can be clearly shown to be in conflict with the federal constitution. It is well settled rule of constitutional exposition, that if the statute may or may not be, according to circumstances, within the limits of legislative authority, the existence of the circumstances necessary to support it must be presumed.

> Greenwood v. Freight Co., 105 U. S. 13, 22,
> Sweet v. Rechel, 159 U. S. 380, 392, 393,

Wilcox v. Consolidated Gas Co., 29 Supreme Ct. Rep. 192, 201,
Fletcher v. Peck, 6 Cranch, 87, 128,
Sinking Fund Cases, 99 U. S. 700, 718.

The Legislative Journals Are Not Conclusive.

There is a strong presumption that the journals of a legislative body are a correct record of the proceedings; that they tell the truth and the whole truth; that they do not omit material facts, nor contain clear mistakes of fact or law. This strong presumption, however, is not conclusive, but casts the burden upon those denying the correctness of the recitals and statements in the journals to show beyond any just and fair doubt that the records are in fact erroneous and defective. Full faith and credit is given to the public acts and records of Michigan by presuming them valid until the contrary clearly appears. This assumed verity may be overcome by countervailing facts.

This court has been given ample power not only to declare the meaning of the constitution, but also, to nullify any statute repugnant thereto. If legislative bodies can make their bad journals conclusive evidence so as to validate what otherwise would be an invalid enactment on contract subjects, it is easy to show that a constitution on parchment is worth nothing. In the instant case the entries in the journals do not relate to the subject of general enactments, nor to the law making functions of the legislature, but on the contrary, the entries in these journals are confined to the revocation of a single legislative contract and the repealing acts are directed to one corporation. In short, the acts do not pretend to be general laws, so whether a court can go back of the records in a case involving the action of a state legislature in enacting a general law is not a question now before this court.

The Federal courts, under proper pleadings, have the power when contract rights are involved, to go behind the face of legislative acts and, also, of the journals, when a state claims it has annulled a private charter. When a legislature is acting solely as a law-making body, then the recitals on the face of its journals may be conclusive in

state courts on broad grounds of sound public policy; such courts, perhaps, may not allow in that class of cases the recitals appearing on the face of legislative journals to be contradicted. That, however, is not this case; here the legislature attempted to annul a legislative contract to which it was one of the parties. The company insists that its constitutional rights were invaded and that these particular Journals ought not to be conclusive in the case at bar.

New Jersey v. Yard, 95 U. S. 104, 113,
State v. Cincinnati Gas Light Co., 18 Ohio St. 262,
Cronise v. Cronise, 54 Pa. St. 255.

If incorrect and defective legislative journals are made conclusive, in some cases they would have the indirect effect of nullifying a federal power granted to the Supreme Court of the United States. They would constitute an oblique invasion not only of the powers of this court to nullify a statute repugant to the constitution, but also, an oblique invasion of the inhibitions and restrictions in that document, against a state impairing the obligations of contracts or depriving one of property without due process of law.

In Mugler v. Kansas, 123 United States, 623, 661, Mr. Justice Harlan said:

> "The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority."

In Fairbank v. The United States, 181 United States, 283, 294, Mr. Justice Brewer said:

> "In other words, that decision (referring to Woodruff v. Parham, 8 Wall. 123) affirms the great principle that what cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result."

In Postal Telegraph Co. v. Adams, 155 United States, 688, 698, Mr. Chief Justice Fuller said:

> "The substance and not the shadow determines the validity of the exercise of power."

In Smith v. St. Louis Ry. Co., 181 United States, 248, 257, Mr. Justice McKenna said:

> "Any pretence or masquerade will be disregarded and the true purpose of a statute ascertained."

This court, being "the living voice of the Constitution," cannot be silenced by incorrect and defective recitals in legislative journals. It seems to us, that under the Federal Constitution, which is the law of laws, such a closure theory cannot be maintained in this court. In the language of Mr. Chief Justice Marshall:

> "It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits." (Marbury v. Madison, I Cranch 137, 178.)

The Special Allegations in Our Plea Fully Negative All Reasonable, Fair and Just Presumptions in Favor of the Validity of the Repealing Acts.

It is true, that general propositions of law do not carry us far towards the landing spot, where the special facts of a particular case are to be found. But, our plea, in the nature of an answer, is neither vague nor general; it sets out the particular facts which constituted a designed plan and fraudulent scheme culminating in the pretended passage of the repealing acts, thereby rendering such enactments void. The plea also alleges specific facts clearly showing that the legislative journals are incorrect and defective on the vital point relating to the actual votes of all the members of the legislature, excepting only the local delegation from Kent county. These particular facts in the plea are scheduled on pages 7 to 11 of this brief.

The Hydraulic Company, by section 8 of its charter, was required to furnish " a supply of pure and wholesome water, sufficient for the use of all such citizens dwelling in the said village, *as shall agree* to take it on the terms to be demanded by said company; in default whereof the said corporation shall be dissolved." (See " Exhibit A" of this brief, at the end of section 8.)

It is a significant fact, that the company was not charged either in the proceedings before the municipal council nor in the legislature, with misconduct or any violation of its charter obligations. On the contrary, the plea alleges, the company has performed its functions; that " it has an excellent supply of water drawn from springs, located a short distance up the river and outside the corporate limits of the city; it has modern pumps, engines of the latest design; many miles of iron mains and pipe lines, properly connected with buildings, and a large number of consumers paying agreed rates for water supplied by it to them." (R. 5, mid.). The plea then asserts, that the city of Grand Rapids, through its agents, secretly and carefully planned a fraudulent scheme " to crush the Hydraulic Company and take away all of its franchises by legislative action, without notice or process and without hearing, for the benefit of the municipal treasury, and merge the plant of the company into the public system without paying just compensation to the Hydraulic Company." (R. 5, bot. and 6, top). The mode and manner of carrying out and executing this designed scheme was in substance as follows: A communication was made by the mayor of the city to the common council, recommending that the legislature be induced to repeal, without delay, the Hydraulic charter; the council instructed the city attorney to draw a bill in accordance with this recommendation and directed a copy to be furnished, not to the Hydraulic Company, but only to the senators and representatives from Kent county, being seven in number. The city attorney, without delay, drew such a bill; he delivered a copy of it to the members of the Kent county delegation in the legislature, urging the representatives and senators of this local delegation to introduce such bill at once, and, if possible, cause it to be passed immediately without notice to the Hydraulic Company and

without a hearing or opportunity for that company to be heard on the merits of the bill. (R. 6). That a local representative from the city, in part execution of the mischievous plan and concurring and complying with the unreasonable request of the mayor, common council and city attorney, did introduce, without any notice whatever to the said Hydraulic Company, into the house of representatives such bill, and moved a suspension of the rules and the passage of the bill at once without referring it to any committee, and without the company having any opportunity to be heard. The rules were suspended and the bill was passed by the house at once. (R. 6).

The plea further avers, that the officers of the Hydraulic Company learned for the first time, from outside sources, that a bill to repeal its charter had that day been introduced in the legislature, and at once representatives of the company went to Lansing and had several interviews at the capitol building with those having the bill in charge, and before the legislative session began on that day, they then and there protested to members of the house and senate against the passage of the bill in the mode and manner attempted; they with insistency, requested a fair opportunity to be heard on the merits. This protest was relentlessly ignored and such reasonable request was unconditionally rejected by those having charge of the bill in both houses. (R. 7).

The plea then avers, it was an established custom in the legislative body that when the members from a particular district were a "unit" on a measure affecting only their own district and not the people of the state generally, for all other members of the legislature to vote for such pending local measure at the request of the members from such local district, expressed through those having the bill in charge. That, under this "unit" rule, the members of the legislature, without investigating the merits of the bill and without, in fact, exercising their judgment or discretion at all, were required when requested by the local delegation, to vote for such local bills. The respondents averred that the passage of the bill repealing its charter was, as a matter of fact, brought about by the statements and representations made by the local members of the legislature having the

measure in charge: " that the delegation from Kent county was a 'unit' in favor of said bill; that it did not involve a subject in which the people of the state of Michigan were interested, whereas, in point of fact, the charter so attempted to be repealed was not in its nature a mere local matter nor a contract between the city and the Hydraulic Company, but on the contrary, was a valid and legal existing contract, entered into between the state of Michigan as one party, and the Hydraulic Company as the other party. The members of the legislature outside of Kent county relied upon the aforesaid (incorrect) representations and statements and voted for the bill as aforesaid without in fact exercising their judgment or discretion at all upon the merits of the so-called local measure." (R. 7 and 8).

These repealing acts were passed by the legislature under this " unit " rule, the members relying upon the erroneous statements and representations that it was a local measure only, when in fact, the bill involved a general public question, because its intention was to revoke an express contract between the people of the state and the Hydraulic Company. The plea claims that the passage of the measure " did not receive the real assent of a majority of the members of each house who were present and voted, for, although they in form voted yea, nevertheless, they did so nominally and as a mere form, and not otherwise; they voted yea as aforesaid in compliance with the aforesaid established custom relating to local measures and in reliance upon the aforesaid representations and the special request of the members of the local delegation from Kent county, expressed through Representative Ellis and Senator Fyfe, both from Grand Rapids." (R. 9).

It appears that the local delegation from Kent county is composed of seven senators and representatives. (R. 6). It also appears that 104 members of both houses were present and all voted yea on the pretended passage of the repealing measures. (R. 16, 17). It is also alleged, these repealing acts are non-enforceable, invalid and void for the reasons:

" (g) Each of said acts is invalid in that the legislature of the state of Michigan in passing them did not in

fact, nor in good faith, exercise its discretion at all, but on the contrary, acted arbitrarily and unreasonably in passing both of said acts without a hearing and without process."

" (i) That said acts are void in that they were declared passed without the real assent of a majority of the members present in either house when the votes on said bill were taken upon its aforesaid first and second passage."

" (a) Each of said acts is in conflict with § 10 of Article I of the Constitution of the United States, prohibiting the state from passing any law impairing the obligation of contracts."

" (b) Each of said acts is in conflict with the Fourteenth Amendment of the Constitution of the United States, prohibiting the state from making or enforcing any law depriving any person of property without due process of law." (R. 11).

This short condensation represents the real essence of the plea on this branch of the case. The specific and particular facts set out will be found collected in this brief under the head of " Statement of Case." (pp. 7 to 11). For full particulars, see paragraph three of the plea itself, on pages 5 to 10 of the record.

The So-Called "Unit" Rule and the Seven Local or Kent County Members of the Legislature, Who Used it to Pass the Repealing Acts.

The " unit " rule or established custom, at least, when extended beyond purely local matters and applied to the annulment of contracts with the state, is inherently vicious.

It may be likened to a voting trust in corporations, where the holders of shares enter into an agreement that the trustee shall have the power to vote on them, dictating the policy and management of the company. The courts are unanimous in holding that such voting trusts are void, because the objects intended to be derived from such agreements are against public policy, particularly where the stockholders undertake to denude themselves for a fixed period of the power to determine for themselves the proper management of the affairs of their corporation. In other

words, these voting trusts are held invalid where the share holders deprive themselves of power of exercising their own judgment in respect to the management of the corporation. If the share holders combine to entrust and confide to their trustees and exclude themselves from the absolute management and control of their corporation the scheme is invalid.

Dill on Corporations, (4th Ed.) § 36, pp. 68-70.

In the case at bar the Kent county delegation acted as a "unit" the same as voting trustees in a private corporation; the other members of the house and senate outside of Kent county, voluntarily denuded themselves under the "unit" rule of an official duty; each member ought to have determined for himself by the exercise of his judgment whether he should vote yea or nay on the pending repealing measures. The seven members of the Kent county delegation composed a cabal; they were united in their design to arbitrarily and capriciously crush the Hydraulic Company for the sole benefit of the city's treasury; these seven votes were tainted by the wrongful intent of the crafty plan originated by the mayor and municipal council. It seems, these seven voters acted with bad motives and not in good faith towards the Company. We claim, that the repealing measures were not legally passed.

The Judgment of Ouster, also the Written Opinions of the Trial and Supreme Courts.

The trial judge in the circuit court for the county of Kent, in sustaining the demurrer, said, in paragraph III:

> "The general rule is that unless the legislative journals affirmatively show that the constitutional requirements with reference to the passage of any act were not complied with, the act must stand. The presumption is *conclusive*, unless the fact affirmatively appears to the contrary, that all requirements necessary to make the act legal have been complied with. The journal is the *only authority* the court can consider. But it is urged that a different rule should be applied in this case. The repeal of this act was clearly within the legislative authority

and I do not think it competent to go behind the records of the journal to inquire into the motives of that body in passing the act in question. I am unable to see in this case the distinction sought to be made by respondents' counsel between the legislature as a law-making and as a contract-making body. The rules governing the conclusiveness and legality of its acts are, in my judgment, the same in both cases." (R. 33, 34).

The final judgment in the circuit court for the county of Kent contains this paragraph:

> "It is therefore considered and adjudged that the demurrer to respondents' plea be sustained and that the respondents have no authority in law to act as a body corporate or exercise the rights, privileges and franchises of a body corporate, and that said respondents be and they hereby are altogether excluded, ousted and prohibited from exercising or assuming to exercise corporate rights, privileges or franchises." (R. 21).

The cause was removed to the state supreme court on eighteen assignments of error. (R. 34-38). That court sustained the rulings of the circuit court and affirmed the judgment of ouster in all things, saying, in paragraph 1 of its written opinion, that:

> "The respondents admit that more than two-thirds of the members-elect to each house voted for the repealing laws in question. They complain because they were denied the right to prove that they so voted without investigating the merits, and 'without in fact exercising their judgment and discretion on the merits' in compliance with a custom relating to local measures and in reliance upon the representations of the members of Kent county to the effect 'that the delegation from Kent county was a *unit* in favor of said bill and that it did not involve a subject in which the people of the state of Michigan were interested.' We think the ruling complained of was correct." (R. 39).

***" In this connection we notice the contention of respondent that in repealing that law the legislature must act in good faith. It is sufficient to say that the courts must *conclusively* presume that the legislature did act in good faith. Under the rule above stated the courts have no authority to investigate that question." (R. 39, 40).

In paragraph 3 the supreme court said:

" In the circuit court respondents urged that the repealing act impaired the obligations of the contract between the Hydraulic Company and the state contrary to the provisions of the constitution of the United States; that it deprived the company of its property without due process of law, contrary to the provisions of the constitution of the state of Michigan and of the Fourteenth Amendment of the constitution of the United States; that it took its private property for public use in contravention of Section 2 of Article 18 of the constitution of Michigan. In our judgment none of these objections are tenable." (R. 41).

The final judgment of the supreme court was as follows:

" The record and proceedings in this cause having been removed to this court by writ of error, issued to the circuit court for the county of Kent, and the same, and the matters in error assigned, having been seen and inspected and duly considered by the court, and it appearing to this court that in said record and proceedings, and in the giving of judgment in said circuit court there is no error. Therefore, it is ordered and adjudged that the judgment of said circuit court for the county of Kent be and the same is hereby in all things affirmed, and that the relators do recover of the respondents their costs, to be taxed, and that they have execution therefor." (R. 43).

The respondents, deeming themselves aggrieved by the rulings, decisions and judgment of the supreme court of

the state, sued out this writ of error; they claim by their assignments of error in this court, numbered from one to nine, (R. 47, 48), that the supreme court of Michigan fell into serious errors in overruling their plea and in rendering a judgment of ouster against the Company.

Not Due Process of Law.

We respectfully submit, that the final judgment of ouster rendered by the supreme court of Michigan should be reversed. While this court is reluctant to nullify a state statute, it always has been cautious and conservative in exercising this most delicate and important power, yet it has been constrained in many instances to declare state statutes unconstitutional because they impaired the obligation of contracts, or because they did not afford due process of law. In conclusion on this branch of the case, we respectfully submit, that according to the plea, the designed scheme and clandestine procedure, coupled with the mode and manner adopted by the Michigan legislature in the pretended passage of the repealing bills, make the so-called enactments spurious statutes; they are merely semblances of legal enactments; they are invalid; they can not afford due process of law, which was the intention of the Fourteenth Amendment to require, in order to prevent the deprivation of property by state action.

The Trust Mortgage and Coupon-Bonds.

(a) In paragraph 4 of the plea, (R. 10) it is alleged, that the Hydraulic Company, in 1886, executed a trust mortgage on its plant and also its franchise to supply water; it was security for 1,200 coupon-bonds of the company of the face value of $1,000 each; that the company, within a short time after the execution of this trust mortgage, issued 680 of its coupon-bonds secured by such trust mortgage and sold or pledged them in the open market for valuable consideration to *bona fide* purchasers in the regular course of business, all of which bonds are now outstanding and unpaid, but legally secured by such trust mortgage. It seemed to the pleader, that it was the duty of the company, if it saw impending waste, impairment or diminution in the

value of the bonds, to call the court's attention to such fact. It is true, that bondholders must accept the result of a proper annulment of a charter by a state without complaint, although incidentally they may suffer consequential loss on account of the depreciation in the value of their bonds. In paragraph 6 of the demurrer, (R. 13) it is stated, "that the bondholders of the Grand Rapids Hydraulic Company are not before the court in this proceeding and cannot properly be made parties thereto, and all allegations in the so-called plea about such bondholders or lienors are improper, superfluous and of no value as a pleading to the information filed herein."

(b) The mortgage trustee and the bondholders themselves being absent, the state court, we think, was without power to adjudge under the pleadings in this case, that that part of the trust mortgage covering the franchise right to maintain, operate and extend the plant under the conditions of the original charter, was destroyed by the repealing act. The trial court recognized this principle, for in paragraph 1 of its memorandum opinion it said: "The rights of the stockholders to the tangible property of the company and rights of the bondholders to their security are, therefore, unaffected by this proceeding, except as they may be incidentally affected by the forfeiture of the company's charter." (R. 33). The state supreme court, it seems, did not agree with the trial court on this point, for in paragraph 3 of its opinion, (R. 41-42) it is said:

> "In the circuit court respondents urged that the repealing act impaired the obligations of the contract between the Hydraulic Company and the state contrary to the provisions of the constitution of the United States; that it deprived the company of its property without due process of law, contrary to the provisions of the constitution of the state of Michigan and of the Fourteenth Amendment of the constitution of the United States; that it took its private property for public use in contravention of Section 2 of Article 18 of the constitution of Michigan. In our judgment none of these objections are tenable. The repealing act does not take from the corporation any personal or real property acquired during

its legal existence. It does take from it this, and only this: its right to continue to be a corporation. It takes from it no right, franchise or power which does not depend for its existence upon the granting clause of the charter and these it had a legal right to take. Greenwood v. Freight Co., 105 U. S. 21. *These rights* it obtained from the legislature of the state of Michigan. *By its terms, the law granting these rights might, at any time, be repealed by the legislature.* The corporation would exist until and only until the legislature repealed the law creating it. The life of the corporation expired, according to the terms of its charter with the repeal of the law. Any argument that the repeal destroyed any constitutional right must rest upon the impossible assumption that the corporation had a legal right to exist for a term longer than that specified in its charter. It had no such right. If authority in support of this reasoning be needed, we think it is found in Greenwood v. Freight Company, supra." (Assignment of Error 6, R. 48).

"In this connection we consider the claim of respondents that the constitutional rights of certain holders of bonds of the corporation are impaired by the repealing acts. These holders of bonds are creditors of the corporation who are secured by mortgages upon the corporate property and franchises. We deem it sufficient to say that the franchise mortgaged to secure these bonds was no other than that granted to the corporation. Nor did the mortgage in any way change its effect or lessen the right of the legislature to repeal it at any time. The bondholders acquired no greater rights than the corporation had. The existence of the bonds secured by the mortgage is therefore an entirely immaterial circumstance and in no way affects the correctness of the foregoing reasoning." (Assignment of Error 9, R. 48).

This franchise right of the mortgagor to maintain, operate and extend its system as a going concern was valuable property; it could be separated from the company's

franchise to live; it could be mortgaged to secure bondholders. But, the state supreme court said: "By its terms, the law granting these rights might at any time be repealed by the legislature." This franchise could not be repealed at any time by the legislature. The purchaser under foreclosure proceedings could maintain, operate and extend the system "under precisely the same conditions" as the corporation had the right to do, if living. This, we understand, is the law of Michigan. (R. R. Commissioners v. G. R. & I. Ry. Co., 130 Mich. 248, 253). In Vicksburg v. Vicksburg Water Works Co., 202 U. S. 453, this court said, through Mr. Justice Day, (p. 464): "Where a company is authorized to mortgage its franchises and rights, these may be sold and the purchaser acquire title thereto at foreclosure sale, although the corporate right to exist may not be sold."

In New Orleans Ry. Co. v. Delamore, 114 U. S. 501, 507, it was contended that under a sale in bankruptcy proceedings of a street railway the only thing the purchaser acquired was the physical property of the bankrupt company, without the right of way or other franchises. But, on that point this court said: "The contention of the defendant, if sustained, would entirely destroy the value of the property as a railroad for it is plain that a large part, if not all the line of the railroad, is laid upon the streets and public grounds of the city. If, therefore, the franchise of the right to occupy the streets and public grounds with the railroad track did not pass to the purchaser at the bankruptcy sale, then all that he took by his purchase was a lot of ties and iron rails, which he could be compelled at any time, by the order of the city authorities, to remove. If the law be as contended by the defendant in error, a judicial sale of the railroad and the franchises would be the destruction of both."

In paragraph 3 of the opinion of the state supreme court above quoted, it was said: "The repealing act does not take from the corporation any personal or real property acquired during its legal existence. * * * * * * * It takes from it no right, franchise or power which does not depend for its existence upon the granting clause of the charter, and these it had a right to take. * * * * * * *

Any argument that the repeal destroyed any constitutional right must rest upon the impossible assumption that the corporation had a legal right to exist for a term longer than that specified in its charter. It had no such right." We call attention to the fact that the life and all of the franchises of the Hydraulic Company were specified in its charter to be "*forever.*" (Section 1 of the charter, "Exhibit A," annexed hereto). The opinion of the supreme court is somewhat obscure and ambiguous on this point, but it seems to be assumed by that court, that the life of the trust mortgage covering all of the franchises of the corporation was co-terminus with the unforeseen, shortened and curtailed life of the corporation itself, excepting only as to personal and real property acquired; that none of its franchises could survive its dissolution; that the trust mortgage previously given on its franchise to operate the system would fall with the repeal of its charter. Both state courts held the repealing acts valid, notwithstanding the legislature confessedly assumed the power to wrest from the bondholders the franchise to maintain and operate the water-works system. The repealing acts, on their face, contemplated the absolute destruction of such franchise security. At the end of the above quoted paragraph 3 of the opinion, the supreme court stated: "If authority in support of this reasoning be needed, we think it will be found in Greenwood v. Freight Co., supra." It will be noted, that in the Greenwood case it did not appear that such corporation ever executed a mortgage of any kind or issued bonds to secure creditors.

In a leading case involving the rights of creditors secured by mortgage on the franchises and property of the Broadway Surface Railroad Company, (reported as People v. O'Brien, 111 New York, 2) it was held under a charter which was subject to be repealed by the legislature under a reserved power to do so, yet that did not constitute a limitation upon the estate granted nor upon the perpetual franchise to operate such surface railroad in Broadway. The court of appeals held, (p. 36-37):

> "The statutes upon which the action is predicated, confessedly assume the right and power of the legislature to wrest from the company its fran-

chises. * * * * * * * The statutes contemplate the absolute destruction of the property of the corporation, and the loss of its value to the creditors who have made loans in good faith upon the security of such property. * * * * * * * It is, therefore, urgently contended by the attorney-general that none of the franchises of the corporation survived its dissolution, and that the mortgages previously given thereon, as well as all contracts made with connecting street railroads for the mutual use of their respective roads, fell with the repeal and could not be enforced.

If it could be supposed for a moment, that this claim was reasonably supported by authority, or maintainable in logic or reason, it would give grave cause for alarm to all holders of corporate securities. * * * * * * * We think that there are no reported cases in which the judgment of the court has ever taken the franchises or property of a corporation from its stockholders and creditors, through the exercise of the reserved power of amendment and repeal, or transferred it to other persons or corporations, without provision made for compensation."

In Detroit v. Detroit Citizens' St. Ry. Co., 184 U. S. 368, this court said, (p. 395) in referring to the Broadway case and approving the principle therein stated, that it "is one of the leading cases in New York upon that subject, and it was there held that a corporation, although created for a limited period, might acquire title in fee to property necessary for its use, and where the grant to a corporation of the franchise to construct and operate its road in the streets of a city is not, by its terms, limited and revocable, *the grant is in fee vesting* the grantee with an interest in the street in *perpetuity* to the extent necessary for a street railroad; the rights granted to be exercised by the corporation or whomsoever may lawfully succeed to such rights. In that case the authorities show that a franchise of the above nature is invested with the character of property and is transferable as

such, independently of the life of the original corporation."

That part of the opinion of the state supreme court relating to the franchise security rests, it seems, upon the implied assumption by the court that the mortgage of the perpetual franchise to maintain, operate and extend the waterworks system must fall or expire whenever the charter life of the Hydraulic Company itself shall come to an end. But, this part of the opinion was not carried forward into the final judgment. The final judgment was specific in its terms; it was confined to one subject, namely: the ouster of the corporation itself; it did not mention the trust mortgage nor the bonds. (R. 20, 21, 43). But, whatever the supreme court intended by or said in its opinion against the right of the bondholders to their franchise security was not an adjudication, for that part of the opinion was not put into the final judgment. It is elementary, that in a judgment rendered and not in the opinions pronounced, will be found the thing adjudged. In short, the opinion of the court is no part of the judgment and cannot be used to show what matters were considered or decided in case the judgment is not specific. (1 Van Fleet's Former Adjudication, § 278, p. 614).

If the rights of the secured bondholders were involved in this case, yet, although the legislature might take away the charter life of the company, it could not do away with that part of the trust mortgage covering the franchise to run the system, nor undo what had been done by the Hydraulic Company. We think, that so long as these secured bonds are outstanding under the mortgaged franchise, no legislative body can put the Hydraulic plant at a standstill, nor stay its business activity.

We, from our point of view and with deference, ask that the judgment of the Supreme Court of Michigan be reversed.

Respectfully submitted,

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Attorneys for Plaintiffs in Error.

"Exhibit A."

The Special Charter of the Grand Rapids Hydraulic Company, Act No. 223, "Laws of Michigan, 1848-9," on pp. 298 to 304.

AN ACT to incorporate the Grand Rapids Hydraulic Company.

Section 1: Be it enacted by the senate and house of representatives of the state of Michigan, that George Coggershall, Thomson Sinclair, Charles Shepard, Canton Smith and James M. Nelson, and their present and future associates, their successors and assigns, be, and they are hereby created a body corporate and politic, by the name of the "president and directors of the Grand Rapids Hydraulic Company," and are hereby ordained, constituted and declared to be, forever hereafter, a body corporate and politic in fact and in name; and by that name, they and their successors shall, and they may have continual succession, and shall be persons in law, capable of suing and being sued, pleading and being impleaded, answering and being answered unto, defending and being defended in all courts and places, whatsoever, in all manner of actions, suits, complaints, matters and causes whatsoever, and that they and their successors may have a common seal, and make, change and alter the same at their pleasure; and also, that they and their successors, by the same name and style, shall be, in law, capable of purchasing, holding and conveying any estate, real and personal, for the use of said corporation, provided that the real and personal estate so to be holden, shall be such only as shall be necessary to promote or attain the objects of this incorporation.

Section 2: That the capital stock of the said corporation shall not exceed thirty thousand dollars, and that a share in the said stock shall be fifty dollars; and that subscriptions to the said capital stock shall be opened, and kept open under the direction of said president and directors, until the whole number of shares subscribed amount to six hundred shares, when the said president and directors may commence operation under this act, and may make there after, from time to time, such regulations concerning further subscriptions to stock, as to them shall

seem proper to enable the said company to enlarge or carry into operation their works; and especially as to when further subscriptions to the capital stock may be opened and made, and what amount of stock, from time to time, may be subscribed, until the whole, or any part of said capital stock shall be subscribed.

Section 3: That the stock, property and concerns of said company shall be conducted and managed by five directors, who shall be stockholders and residents of said village of Grand Rapids, which directors shall hold their office for one year from the first Tuesday of May, in every year; and the said directors shall be elected on the first Tuesday in May in every year, at such time of day, and at such place within the village of Grand Rapids, as the directors for the time being, or a majority of them shall appoint; and public notice thereof shall be given by said directors, not less than twenty days previous to the time of holding the said election, by advertisement to be inserted in at least one public newspaper printed in said village; and the said election shall be made by such of the stockholders of the said company as shall attend for that purpose in their proper persons, or by proxy, which proxies shall be stockholders, and all elections shall be by ballot; and the five persons who have the greatest number of votes at any election shall be the directors; and if it shall happen at any election that two or more persons have an equal number of votes in such manner that a greater number of persons than five shall, by plurality of votes, appear to be chosen as directors, then the said stockholders hereinbefore authorized to vote at such election, shall proceed to ballot a second time and by plurality of votes determine which of the persons so having an equal number of votes shall be the director or directors, so as to complete the whole number of five. And the said directors, as soon as may be after their election, shall proceed in like manner to elect by ballot one of their number to be their president; and if any of the directors so to be elected, shall at any time remove out of the village of Grand Rapids, the office of such director or directors shall be considered as vacant; and if any vacancy or vacancies shall at any time happen among the directors by death, resignation, removal, or otherwise, such vacancy or vacancies shall be filled, for the remainder of the

year in which they may happen, by such person or persons as the remainder of the directors for the time being, or the major part of them, shall appoint; that the first directors shall be George Coggershall, Thomson Sinclair, Charles Shepard, Canton Smith and James M. Nelson, who shall hold their offices until the first Tuesday of May next, and the said first directors, at their first meeting shall proceed to appoint their president.

Section 4: That the directors shall have power to appoint the time and place of all meetings for the despatch of business, to appoint all such officers, agents, clerks, superintendents and servants, as they shall deem necessary for carrying into effect the powers by this act vested in said company, and to establish rules and regulations for and concerning the conduct and government of such officers, agents, clerks, superintendents and servants.

Sections 5, 6 and 7: Powers of Condemnation.
(Immaterial and omitted.)

Section 8: That it shall be lawful for the president and directors of said company, from time to time, to make and establish such by-laws and ordinances as they may think fit and proper, and as may be consistent with the constitution and laws of this state and the United States, for conducting and managing the affairs of said company, and for conducting and preserving the said works and every of them, and for conveying, employing, distributing and disposing of the water so as to be conducted as aforesaid, and for carrying into effect all the objects and purposes of said corporation; and may also agree with the corporation of the said village of Grand Rapids, the inhabitants of said village, and others choosing to use or take said water, regarding the rates at which the same shall be paid for: Provided, That the said company shall, within five years from the passage of this act, furnish and continue with no unreasonable delay, a supply of pure and wholesome water, sufficient for the use of all such citizens dwelling in the said village, as shall agree to take it on the terms to be demanded by said company; in default whereof the said corporation shall be dissolved.

Section 9: That it shall be lawful for said directors to call and demand from the stockholders, respectively, all

such sums of money by them subscribed, or to be subscribed, at such times, and in such proportions, as they shall see fit, under pain of forfeiture of their shares, and of all previous payments thereon, to the said president, directors and company.

Section 10: That if any person or persons shall wilfully do, or cause to be done, any act whatsoever, whereby the said works, or any pipe, conduit, canal, watercourse, mound, plug, cock, reservoir, dyke, or any engine, machine, or structure, or any matter or thing appertaining to the same, shall be stopped, obstructed, impaired, weakened, or injured, the person or persons so offending, shall forfeit and pay to the said company treble the amount of damages sustained by means of such offence or injury, to be recovered by such company with costs of suit, and by action of debt in any of the courts of this state, which action shall in every instance be considered as transitory in its nature, and shall and may be triable in any county in this state.

Section 11: Said company shall be entitled to all the benefits, and subject to all restrictions of chapter fifty-five of the revised statutes of 1846, so far as the same be applicable and not inconsistent with this act. The legislature may at any time hereafter amend or repeal this act.

Approved, April 2, 1849.

"Exhibit B."

The Repealing Act No. 455 of the Local Acts of 1905.

AN ACT to repeal an act entitled "An act to incorporate the Grand Rapids Hydraulic Company," approved April two, eighteen hundred forty-nine, and to provide for presentation and allowance of claims against the city of Grand Rapids for the value of the tangible property of said company at the time of the approval of this act.

The people of the state of Michigan enact:

Section 1: An act entitled "An act to incorporate the Grand Rapids Hydraulic Company," is hereby repealed to take effect November one, nineteen hundred five: Pro-

vided, That for the purpose of closing up its affairs only it may be continued for one year thereafter.

Section 2: The Grand Rapids Hydraulic Company may, at any time before January one, nineteen hundred six, and not thereafter, present a claim to the common council of the city of Grand Rapids for the value of the real and tangible estate owned by it, not including franchise, at the time of the approval of this act, and transfer such property to said city in consideration therefor. If the said company and the said common council shall be unable to agree upon the valuation of said property within thirty days thereafter, then such claim may be filed within the further time of thirty days, in the form of a claim in assumpsit in the superior court of Grand Rapids, and issue framed thereon in the nature of assumsit. The rules and practice in suits of assumpsit shall be applicable thereto. Either party to such issue may take the same for review to the supreme court of the state, upon the questions of law raised upon the trial, or charge of the court made to a jury, if the same shall be tried before a jury. The amount finally awarded to said company against the city of Grand Rapids shall be a claim against the city to be paid in the same manner as other claims: Provided, That if the said Hydraulic Company shall not elect to present a claim against the said city and transfer its property to said city, it may, upon giving a bond with sufficient sureties to be approved by the common council to protect the city from any damages caused thereby, remove all of its tangible property from the streets, lands and alleys in said city, under the direction of the board of public works of said city, and in the event of any disturbance of the street or alley grades, or injury thereto, caused by said removal, it shall at the time of removal of its property therefrom cause the said streets, lands and alleys to be repaired and placed in as good condition as before.

Approved April 5, 1905.

The Repealing Act No. 492 of the Local Acts of 1905.

AN ACT to repeal act number two hundred twenty-three of the laws of eighteen hundred forty-nine, entitled "An act to incorporate the Grand Rapids Hydraulic Company," approved April second, eighteen hundred forty-nine, and to provide for presentation and allowance of claims against the city of Grand Rapids for the value of the tangible property of said company, at the time of the approval of this act.

The people of the state of Michigan enact:

Section 1: Act number two hundred twenty-three of the laws of eighteen hundred forty-nine, entitled "An Act to incorporate the Grand Rapids Hydraulic Company," is hereby repealed to take effect November first, nineteen hundred five; Provided, That for the purpose of closing up its affairs only it may be continued for one year thereafter.

Section 2: The Grand Rapids Hydraulic Company may at any time before January first, nineteen hundred six, and not thereafter, present a claim to the common council of the city of Grand Rapids for the value of the real and tangible estate owned by it, not including franchise, at the time of the approval of this act, and transfer such property to said city in consideration therefor. If the said company and the said common council shall be unable to agree upon the valuation of said property within thirty days thereafter, then such claim may be filed within the further time of thirty days, in the form of a claim in assumpsit in the superior court of Grand Rapids, and issue framed thereon in the nature of assumpsit. The rules and practice in suits of assumpsit shall be applicable thereto. Either party to such issue may take the same for review to the supreme court of the state, upon the questions of law raised upon the trial, or charge of the court made to a jury, if the same shall be tried before a jury. The amount finally awarded to said company against the city of Grand Rapids shall be a claim against the city to be paid in the same manner as other claims: Provided, That if the said Hydraulic Company shall not elect to present a claim against the said city and transfer its property to said city,

it may, upon giving a bond with sufficient sureties to be approved by the common council to protect the city from any damages caused thereby, remove all its tangible property from the streets, lands and alleys in said city, under the direction of the board of public works of said city, and in the event of any disturbance of the street or alley grades, or injury thereto, caused by said removal, it shall, at the time of removal of its property therefrom, cause the said streets, lands and alleys to be repaired and placed in as good condition as before.

Approved, April 25, 1905.

FILED
APR 2 1910
JAMES H. McKENNEY,
Clerk

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 58.

JOHN P. CALDER, DAVID A. CROW, JOHN E. MUER, THOMAS H. KEOGH and WILLARD KINSLEY,

Plaintiffs in Error,

against

THE PEOPLE OF THE STATE OF MICHIGAN, by the Attorney General, at the relation of GEORGE E. ELLIS, MOSES TAGGART and SAMUEL A. FRESHNEY,

Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR THOMAS H. KEOGH.

HENRY A. FORSTER,

Of Counsel for Thomas H. Keogh,

Plaintiff in Error.

E. C. Stimpson, Book & Job Printer, Detroit, Mich.

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 240.

JOHN F. CALDER, DAVID A. CROW, JOHN E. MORE, THOMAS H. KEOGH and WILLARD KINGSLEY,
Plaintiffs in Error,

AGAINST

THE PEOPLE OF THE STATE OF MICHIGAN, by the Attorney General, at the relation of GEORGE E. ELLIS, MOSES TAGGART, and SAMUEL A. FRESHNEY,
Defendants in Error.

Brief for Plaintiff in Error, Thomas H. Keogh.

Error to the Supreme Court of the State of Michigan to review its judgment affirming a judgment of the Kent County Circuit Court ousting the Grand Rapids Hydraulic Company (a public service or water works company of Grand Rapids, Michigan) from the further exercise of its corporate rights, privileges and franchises, without awarding any compensation either for its tangible property or for its franchise that was destroyed thereby (Judgment of Ouster, p. 21; Judgment of Affirmance. p. 43).

Statement.

The ouster was granted pursuant to two local acts which repealed the Grand Rapids Hydraulic Company's charter, and required it either to "transfer" all its "real and tangible

estate" to the City of Grand Rapids, upon payment "for the value of the real and tangible estate owned by it, not including franchise, at the time of the approval of this act", or in default thereof at its election to "remove all its tangible property from the streets, lands and alleys in said City" (Local Act, No. 492, pp. 18–9; Local Acts, Michigan, 1905, pp. 408–9, Local Act No. 455, Local Acts, Michigan, 1905, pp. 329–30). The acts repealing the charter are printed at pp. 29–32 of this brief.

The proceeding was instituted by an information in the nature of *quo warranto*, filed by the Attorney General of the State of Michigan against the President and Directors of the Grand Rapids Hydraulic Company, at the instance of three relators (Information, p. 1). All the relators were officials of the City of Grand Rapids; the first being its mayor; the second its City Attorney, and the third being the general manager of the city water works. In short, this proceeding is part of a long contest between two rivals in a local water supply business.

The plaintiffs in error, who are the president and directors of the Hydraulic Company, filed a joint plea to the information (Plea, pp. 4–12), to which the State of Michigan demurred (Demurrer, pp. 13–5). The demurrer was sustained and final judgment of ouster was entered thereon (Final judgment, pp. 20–1).

The plea alleged:

1. The incorporation of the Grand Rapids Hydraulic Company under a special charter, granted by a local act of the State of Michigan, passed in 1849 (Plea, p. 4), which is printed at pp. 23–29 of this brief.

By the terms of the charter it was perpetual, and was to last "forever", but it also provided "The legislature may at any time hereafter amend or repeal this act" (Laws of Michigan, 1849, pp. 298, 304; pp. 23, 29 of this brief).

The president and directors of the Hydraulic Company were and are a corporation having its office and place of business in Grand Rapids. The plaintiffs in error were duly elected as its president and directors; they duly qualified and are acting as such. The act of 1849 incorporating the Hydraulic Company is still in full force and unrepealed (Plea, pp. 4–5).

"The Hydraulic Company was duly authorized to supply water from springs, from Coldbrook and the lakes from which this brook had its source, with power to lay pipes, make reservoirs, and do all necessary things to enable it to carry on the business of supplying and distributing pure and wholesome water for household and domestic uses in Grand Rapids." It "constructed and put into operation a water supply plant in Grand Rapids and has from time to time extended its plant and developed its system; it has an excellent supply of water drawn from springs, located a short distance up the river and outside the corporate limits of the city; it has modern pumps, engines of the latest design; many miles of iron mains and pipe lines, properly connected with buildings, and a large number of consumers paying agreed rates for water supplied by it to them."

(Plea, p. 5).

2. In 1872, the city constructed a municipal system of water works, at an ultimate expense of many hundred thousand dollars; the Hydraulic Company and the city water works have been engaged in sharp competition ever since; and their mains and pipes parallel each other in some of the principal streets. Owing to this competition, in 1886, the city filed a bill in chancery against the Hydraulic Company to restrain it from further operating its plant. The bill was dismissed (among other things on the ground that the Hydraulic Company's water was "excellent", and the "city supply is not of good quality for domestic use"); and the dismissal was affirmed by the Supreme Court of Michigan (Plea, p. 5).

In Grand Rapids v. Grand Rapids Hydraulic Co. 66 Mich., 606 (1887) the Court say (66 Mich. 609):

"It appears quite clearly that the defendant company was required by its charter to bring its waters from such sources as would make it likely to be wholesome, and that it was confined in its uses to a fire supply, and to ordinary private uses. The city is not limited either as to quality or uses. It appears also, as a matter of fact, that the quality of defendant's supply is excellent, and that the city supply is not of good quality for domestic use. It is manifest that, if defendant is required to quit business, the results will be disastrous to private health and comfort now, whatever they may be in the future."

3. In 1905, the city through its mayor, common council and other officers, planned to crush the Hydraulic Company and take away all its franchises by legislative action, without paying just compensation to the Hydraulic Company, in order to merge the company's plant into the city water works system, and for the benefit of the municipal treasury (Plea, pp. 5-6). The scheme was executed as follows: The Mayor of the city induced the Common Council to recommend the repeal of the charter; the defendant in error, Moses Taggart, then City attorney, drew the bill for the repeal of the charter, delivered it to the Senators and Representatives from Kent County, and instructed them to introduce it and pass it immediately, without any notice or hearing to the Hydraulic Company. In short, the city applied to the Legislature to annul the charter of the Hydraulic Company for its own benefit (Plea, p. 6). On March 28th, 1905, the bill was introduced in the House of Representatives, without notice to the Hydraulic Company, and was read twice without being referred to a committee. The Hydraulic Company then learned of this and requested a hearing, which was refused. The next day, March 29th, 1905, the bill was passed by the House of Representatives without being referred to a committee and without debate. On the day after it was introduced in the lower house, the rules of the Senate were suspended and it also passed the Senate without consideration (Plea, pp. 6–7). The passage of the bill was procured by unparliamentary acts and statements made by the Senator and by one Representative from Grand Rapids, which were relied upon by the other members of the Legislature, pursuant to the established Michigan usage "relating to purely local measures"; it never received the real assent of a majority of the members of either house as required by the Michigan Constitution, and the Hydraulic Company had no opportunity to be heard thereon (Plea, pp. 7–10).

Apparently it was then discovered that the first repealing act was unconstitutional. On April 12, 1905, just a week after the first repealing act had been approved by the Governor of Michigan, "the identical bill" which had become a law a week before, was reintroduced in both houses and re-passed the following day under a suspension of the rules, without being referred to any committee, and without debate. It "did not receive the real assent of a majority of the members of

each house." On April 25, 1905, it was re-approved by the Governor (Plea, pp. 8–9).

The relators and defendants in error are officers of the city. Ellis being its Mayor, Taggart, its City attorney, and Freshney, its General Manager of the City Water Works; they are the authorized agents of the City to assist in carrying out its plan to put the Hydraulic Company out of business and to merge its plant in the City water works system. As such agents they induced the Attorney General of Michigan to bring this proceeding on the ground that it was a matter of public concern " in which the people of the State of Michigan were interested " (Plea, p. 10), and not as had been represented to the Legislature to induce it to pass the repeal bills, as merely a " local measure " (Plea, pp. 7–9).

4. On September 9th, 1886, in order to extend its system and conduct its business, the Hydraulic Company executed and delivered a valid trust mortgage upon its plant, its tangible property, and upon its franchise to own and operate a water supply plant, to the American Loan and Trust Company as Trustee, for the purpose of securing a series of 1200 coupon bonds of the Hydraulic Company of the face value of $1,000 each, with interest. On September 16th, 1886, the mortgage was recorded in the office of the Register of Deeds for Kent County, Michigan. The Hydraulic Company then issued $680,000 of its coupon bonds, secured by said trust mortgage upon its plant and franchise, and sold or pledged them in the open market for valuable consideration, to *bona fide* purchasers in the regular course of business. All these coupon bonds are now outstanding and unpaid, but are legally secured by said trust mortgage. The binding obligations contained in the trust mortgage and secured coupon bonds issued thereunder are protected by the Federal Constitution from Legislative assaults (Plea, p. 10).

5. The plea then sets up the unconstitutionality of the two repealing acts. It avers that they are in conflict with the constitution of the United States.

(*a*) Because they impair the obligation of contracts.

(*b*) Because they deprive the Hydraulic Company of its property without due process of law (Plea, p. 11).

The relators and defendants in error demurred to this plea (Demurrer, pp. 13–15).

The Circuit Judge sustained the demurrer, saying:

"I am satisfied that the reservation of the right to amend or repeal contained in the Act of 1849, gave to the Legislature the undoubted authority to exercise that right at any time thereafter it saw fit. If this is so, it must follow as a logical sequence, that no provision of either the State or Federal constitution can be violated by a proper exercise of this right. * * * The right to incorporate is not such a property right as may not be withdrawn under a reservation in the act itself to that effect. Such withdrawal may affect incidentally the otherwise vested rights of the company, but it cannot be treated either as an impairment of the obligation of a contract or the taking of property without due process of law under the constitutional prohibitions referred to" (Opinion, p. 33).

The Supreme Court of Michigan affirmed the final judgment of ouster, saying:

"In the circuit court respondents urged that the repealing act impaired the obligations of the contract between the Hydraulic Company and the State, contrary to the provisions of the Constitution of the United States; that it deprived the company of its property without due process of law, contrary to the provisions of the Constitution of the State of Michigan and of the Fourteenth Amendment of the Constitution of the United States; that it took its private property for public use in contravention of Section 2 of Art. 18 of the Constitution of Michigan. In our judgment none of these objections are tenable. The repealing act does not take from the corporation any personal or real property acquired during its legal existence. It does take from it this, and only this: Its right to continue to be a corporation. It takes from it no right, franchise, or power, which does not depend for its existence upon the granting clause of the charter, and these it had a legal right to take. Greenwood v. Freight Co. 105 U. S. 21. These rights it obtained from the legislature of the State of Michigan. By its terms the law granting these rights might at any time be repealed by the legislature. The corporation would exist until, and only, until the legislature repealed the law creating it. The life of the corporation expired, according to the terms of its charter, with the repeal of the law. Any argument that the repeal destroyed any constitutional right must rest upon the impossible assumption that the corporation had a legal right to exist for a term longer than that specified in its charter. It had no such right."

(Opinion, pp. 41–2; 153 Michigan, 730).

And further:

"These holders of bonds are creditors of the corporation who are secured by mortgages upon the corporate property and franchises. We deem it sufficient to say that the franchise mortgaged to secure these bonds was no other than that granted to the corporation. Nor did the mortgage in any way change its effect or lessen the right of the legislature to repeal it at any time. The bondholders acquired no greater rights than the corporation had. The existence of the bonds secured by the mortgage is therefore an entirely immaterial circumstance and in no way affects the correctness of the foregoing reasoning."

(Opinion, p. 42; 153 Michigan, 731).

So that the Supreme Court of Michigan ignores the rule that the franchise of a public service corporation to operate its plant for the benefit of its creditors and bondholders is separate and distinct from its franchise to be a corporation, and is independent of the life of the original corporation (Detroit v. Detroit Citizens Street Ry. Co. 184 U. S. 368, 394-5; Vicksburg v. Waterworks Co. 202 U. S. 453, 464; People v. O'Brien, 111 N. Y. 2, 36-8, 40, 47). If the rights of the bondholders and creditors of public service corporations can be enforced only against the tangible property of these corporations, the billions of securities that have been issued upon the franchises of such corporations may be arbitrarily confiscated at the good will and pleasure of any state or territorial legislature or at that of Congress. Unless the voters are universally prepared to do through municipal ownership and operation the work that has hitherto been done through public service corporations, an affirmance of the decision of the court below would put an end to all municipal improvements through the agency of corporations.

The writ of error allowed by the Chief Justice of the Supreme Court of Michigan certified that the Federal questions herein argued were raised in the Michigan courts, and that the decision was against the title, right, privilege or exemption so set up under the Constitution of the United States or under the Fourteenth Amendment thereof (Writ of Error, p. 51).

Assignment of Errors.

It is assigned for error that the Supreme Court of the State of Michigan.

1. Erred in giving judgment for the defendants in error and against the plaintiffs in error.

2. Erred in affirming the judgment of the Circuit Court for Kent County.

3. Erred in holding and deciding that the so called repealing acts numbered respectively, 455 and 492 of the Local Acts of 1905 of the Legislature of the State of Michigan, and each of them, were valid and not in conflict with section 10 of Article I of the Constitution of the United States providing that no state shall pass any law impairing the obligation of contracts.

4. Erred in holding and deciding that the so called repealing acts numbered respectively 455 and 492 of the Local Acts of 1905 of the Legislature of the State of Michigan, and each of them, were valid and not in conflict with the XIV Amendment of the Constitution of the United States, providing that no State shall make or enforce any law depriving any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

ARGUMENT.

I. The so called repealing acts are unconstitutional because they impair the obligation of contracts. The franchise of a public service corporation to operate its plant or works is separate and distinct from its franchise to be a corporation. It may be assigned, transferred or mortgaged independently of the life of the original corporation. When a mortgage thereon is foreclosed, the franchise may be sold on foreclosure sale for the benefit of bondholders and creditors, although the corporate right to exist may not be sold. Franchises are property and cannot be taken or used by others without compensation. A legislature cannot say what compensation shall be paid for or fix the rule of compensation for property taken for public use, nor can it limit the compensation for the franchise and property of a corporation to the value of its tangible property only. The dissolution of a corporation does not impair the claims of its bondholders or creditors. To do otherwise would impair the obligation of contracts.

I. The franchise of a public corporation to operate its plant or works is separate and distinct from its franchise to be a corporation, and is transferable as such independently of the life of the original corporation.

Detroit v. Detroit Citizens Street Ry. Co., 184 U. S. 368, 394–5.
Minneapolis v. Street Ry. Co., 215 U. S. 417, 430.
People v. O'Brien, 111 N. Y. 2, 36–8, 40, 47.
Suburban Rapid Transit Co. v. Mayor, 128 N. Y. 510, 520.
Miner v. N. Y. C., 123 N. Y. 242, 250–1.
Detroit Citizens St. Ry. Co. v. City of Detroit, 12 C. C. A., 365, 370–2; 64 Fed. Rep. 628, 633–5.

Lord v Equitable Life Assurance Society 194 N.Y.

In Detroit v. Detroit Citizens Street Ry. Co., 184 U. S. 368, the court say (184 U. S. 394–5):

"A corporation whose corporate existence was limited to a term of years could always purchase the fee in property which it needed for the operation of its business. If at the end of its term its life were not extended, the property which it owned was an asset payable to the shareholders after the payment of its debts, and in a case like the present, where the consent was assignable and transferable, particularly by virtue of section 15 of the Street Railway Act, * * * any company itself having corporate existence for that purpose, could purchase the outstanding term and operate its road thereunder. We see no reason why the company could not take the extended term as provided for in the ordinance, and it formed a good consideration for the agreement on the part of the company to perform the other obligations contained in the ordinance. This exact proposition has been determined by the Circuit Court of Appeals for the Sixth Circuit in Detroit Citizens Street Railway Company & others v. City of Detroit, 12 C. C. A. 365; same case, 64 Fed. Rep. 628. * * * People v. O'Brien" 111 N. Y. 1, "is one of the leading cases in New York upon that subject, and it was there held that a corporation, although created for a limited period, might acquire title in fee to property necessary for its use, and where the grant to a corporation of the franchise to construct and operate its road in the streets of a city is not, by its terms, limited and revocable, the grant is in fee, vesting the grantee with an interest in the street in perpetuity to the extent necessary for a street railroad; the rights granted to be exercised by the corporation or whomsoever may lawfully succeed to such rights. In that case the authorities show that a franchise of the above nature is invested with the character of property and is transferable as such, independently of the life of the original corporation. The other case, in 123 N. Y., announces the same doctrine. It is not a new one, and the decisions have all been one way, in favor of the right of a corporation, limited as to the time of its corporate existence, to purchase or acquire by agreement or condemnation property for its use, the title to which it might own in fee".

In Minneapolis v. Street Ry. Co. 215 U. S. 417, the court say (215 U. S. 430):

"We may note in this connection that the mere fact that a contract may extend beyond the term of the life of a corporation does not destroy it. This principle was recognized by this court in Detroit v. Detroit Citizens Street Railway Co. 184 U. S. 368. * * * It was held that the limitation

upon the corporate life of the company did not prevent it from taking franchises, or other property, the title to which would not expire with the corporation itself; and further, that at the end of its corporate life, if such property were still in existence, it would be an asset divisible among the shareholders after the payment of debts, or it might, if assignable, be transferred to any other person, or company, competent to hold it."

In People v. O'Brien, 111 N. Y. 2, the court say (111 N. Y. 37):

"Among other claims made by the state, it is contended that the stated term of one thousand years precribed in its charter, for the duration of the company, constitutes a limitation upon the estate granted, and that, therefore, the corporation took a qualified estate only in its franchises, and that the rights reserved by the Revised Statutes (Laws of 1884 and 1850), and the Constitution to alter, amend and repeal the charters or laws under which corporations might be organized, also constituted a limitation upon the estate granted, and that the exercise of the right of repeal by the state accomplished the destruction of the corporation and the annihilation of all franchises acquired under its charter."

And further, p. 38:

"Grants similar in all material respects to the one in question have heretofore been before the courts of this state for construction, and it has been quite uniformly held that they vest the grantee with an interest in the street in perpetuity, for the purposes of a street railroad (People v. Sturtevant, 9 N. Y. 263; Davis v. Mayor, etc., 14 *id.* 506; Milhau v. Sharp, 27 *id.* 611; Mayor, etc., v. Second Ave. R. R. Co. 32 *id.* 261; Sixth Ave. R. R. Co. v. Kerr, 72 *id.* 330)."

And further, p. 40:

"Neither can it be supposed that they contemplated the resumption of property, which they had expressly authorized their grantee to mortgage and otherwise dispose of, to the destruction of interests created therein by their consent.

"We are, therefore, of the opinion that the Broadway Surface Railroad Company took an estate in perpetuity in Broadway through its grant from the city, under the authority of the Constitution and the act of the legislature. It is also well settled by authority in this state that such a right constitutes property within the usual and common signification of that word (Sixth Ave. R. R. Co. v. Kerr, 72 N. Y. 330; People v. Sturtevant, 9 *id.* 263)."

(*a*) A corporate franchise cannot be separated from the lands or works essential to its enjoyment by the sale of the latter; because to separate its tangible property from its intangible property would impair its creditors rights.

Gue v. Tide Water Canal Co. 24 Howard, 257, 263.
Hammock v. Loan and Trust Co. 105 U. S. 77, 89–90.
People v. O'Brien, 111 N. Y. 2, 47.

(*b*) Upon the dissolution of a corporation its property becomes a trust fund for the benefit of its creditors.

Citizens Savings and Trust Co. v. Illinois Central R. R. Co. 205 U. S. 46, 55.
Mellen v. Moline Iron Works, 131 U. S. 352, 366–7.

2. Under the law of Michigan, public service corporations are authorized to mortgage their franchises, hydrants, pipes, poles, wires and rails in the public streets. The purchaser of the franchise may operate it in accordance with its provisions.

Telephone Co. v. City of St. Joseph, 121 Mich. 502, 508–9.
Detroit v. Mutual Gas Light Co. 43 Mich. 594, 599-605.
Joy v. Jackson and Michigan Plank Road, 11 Mich. 155, 165–72.
Michigan Revised Statutes of 1846, Chap. 55, §§ 9–16, pp. 212–3.
3 Michigan Compiled Laws of 1897, §§ 8535–8542, pp. 2628–9.
Grand Rapids Hydraulic Co. charter, § 11, p. 29 of this brief.

In Railroad Commissioner v. Grand Rapids, 130 Michigan, 248, the court say (130 Mich. 252-3):

"May it not be said that the rights and property of this corporation vested in the purchaser upon the foreclosure sale, and that, independent of any express statutory authority to operate, the purchaser was authorized to maintain his property rights, and to operate this railroad in accordance with the franchise of the original company, and under precisely the same conditions?"

3. The right of a public service corporation to mortgage its franchise and privileges (though not its right to be a corpora-

tion) necessarily includes the power to bring the franchise and privileges to sale to make the mortgage effectual. The purchaser at the sale acquires a good and valid title to the franchise, although the corporate right to exist may not be sold.

Vicksburg v. Waterworks Co., 202 U. S. 453, 464.
Julian v. Central Trust Co., 193 U. S. 93, 106.
New Orleans, etc., R. R. Co. v. Delamore, 114 U. S. 501, 507.
Memphis R. R. Co. v. Commissioners, 112 U. S., 610, 619.

In Vicksburg v. Waterworks Co., 202 U. S. 453, headnote:

"The power given under the state law to a corporation to mortgage its franchises and privileges necessarily includes the power to bring them to sale and make the mortgage effectual, and the purchaser acquires title thereto although the corporate right to exist may not be sold."

The court say (202 U. S. 464):

"Where a company is authorized to mortgage its franchises and rights, these may be sold and the purchaser acquire title thereto at foreclosure sale, although the corporate right to exist may not be sold. Memphis R. R. Co. v. Commissioners, 112 U. S. 609. The power to mortgage the privileges and rights of the corporation must necessarily include the power to bring them to sale to make the mortgage effectual. New Orleans, etc., R. R. Co. v. Delamore, 114 U. S. 501, cited and followed in Julian v. Cent. Trust Co., 193 U. S. 93, 106. We think the mortgage in this case covered and the decree passed the contract rights given originally to the Vicksburg Water Supply Company by the ordinance of November 12, 1886."

In Julian v. Central Trust Co., 193 U. S. 93, the court say (193 U. S. 106):

"The power given to mortgage the franchise of the corporation must necessarily include the power to bring it to sale with the property to make the sale effectual as a means of transferring the right to use the thing conveyed. New Orleans, etc., Railroad Co. v. Delamore, 114 U. S. 501.

"It is true the right to be a corporation is not sold. * * * But the franchise to operate and use the property has passed at the sale, and must have done so to make the purchase of any value. This principle, recognizing the distinction between the mere right or franchise to be a corporation and the fran-

chise of maintaining and operating the railroad, was distinctly pointed out by Mr. Justice MATTHEWS in Memphis R. R. Co. v. Commissioners, 112 U. S. 609."

In New Orleans etc. R. R. Co. v. Delamore, 114 U. S. 501, the court say (114 U. S. 507):

"On the other hand, it is contended by the defendant that the right of way and the franchise to build and use a railroad thereon reverted to the City of New Orleans when the railroad company was adjudicated bankrupt, and that all that was surrendered in bankruptcy by the railroad company and sold at the * * * sale, was the railroad without right of way or other franchise.

"The contention of the defendant, if sustained, would entirely destroy the value of the property as a railroad. For it is plain that a large part, if not all the line of the railroad is laid upon the streets and public grounds of the city. If, therefore, the franchise of the right to occupy the streets and public grounds with the railroad track did not pass to the purchaser at the bankruptcy sale, then all that he took by his purchase was a lot of ties and iron rails which he could be compelled at any time, by the order of the city authorities, to remove. If the law be as contended by the defendant in error, a judicial sale of the railroad and its franchises would be the destruction of both."

In Memphis R. R. Co. v. Commissioners, 112 U. S. 610, headnote:

"A franchise to be a corporation is distinct from a franchise, as a corporation, to maintain and operate a railway: the latter may be mortgaged, without the former, and may pass to a purchaser at a foreclosure sale."

The court say (112 U. S. 619):

"The franchise of being a corporation need not be implied as necessary to secure to the mortgage bondholders, or the purchasers at a foreclosure sale, the substantial rights intended to be secured. They acquire the ownership of the railroad, and the property incident to it, and the franchise of maintaining and operating it as such; and the corporate existence is not essential to its use and enjoyment. All the franchises necessary or important to the beneficial use of the railroad could as well be exercised by natural persons. The essential properties of corporate existence are quite distinct from the franchises of the corporation."

4. Franchises of public service corporations are property and cannot be taken or used by others without compensation.

In Willcox v. Consolidated Gas Co., 212 U. S. 22, headnote:

"Franchises of public service corporations are property and cannot be taken or used by others without compensation."

The court say (212 U. S. 44):

"It cannot be disputed that franchises of this nature are property and cannot be taken or used by others without compensation (Monongahela Co. v. United States, 148 U. S. 312; People v. O'Brien, 111 N. Y. 1, and cases cited). The important question is always one of value."

In Wilmington Railroad v. Reid, 13 Wallace, 264, the court say (13 Wall. 268):

"Nothing is better settled than that the franchise of a private corporation—which in its application to a railroad is the privilege of running it and taking fare and freight—is property, and of the most valuable kind, as it cannot be taken for public use even, without compensation."

5. A statute separating the tangible property of a corporation from its franchise, and taking the former for public use while forbidding any compensation for the latter, is unconstitutional. The legislature may determine what private property is needed for public use, but the question of compensation is a judicial one. The legislature may neither say what compensation shall be made nor fix the rule of compensation.

Monongahela Navigation Co. v. U. S. 148 U. S. 312, 327-8.
Vanhorne v. Dorrance, 2 Dallas, 315-6.
Matter of City of New York, 190 N. Y. 350, 352-4, 355, 358-60.

In Monongahela Navigation Co. v. U. S. 148, U. S. 312, a statute reading "Provided, That in estimating the sum to be paid by the United States, the franchise of said corporation to collect tolls shall not be considered or estimated" (25 U. S. Stat. at Large, 400, 411), was held unconstitutional, because the "company is entitled under the provisions of the Fifth Amendment to the Constitution, to recover compensation from the United States for the taking of the franchise to exact tolls, as well as for the value of the tangible property taken."

The court say (148 U. S. 325-6):

"The language used in the Fifth Amendment in respect to this matter is happily chosen. The entire amendment is a series of negations, denials of right or power in the government, the last, the one in point here, being, 'Nor shall private property be taken for public use without just compensation.' The noun 'compensation,' standing by itself, carries the idea of an equivalent. * * * There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken. And this just compensation, it will be noticed, is for the property, and not to the owner. Every other clause in this Fifth Amendment is personal. * * * This excludes the taking into account, as an element in the compensation, any supposed benefit that the owner may receive in common with all from the public uses to which his private property is appropriated, and leaves it to stand as a declaration, that no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner."

And further, p. 327:

"By this legislation, Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial and not a legislative question. The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the Legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry."

And further, p. 328:

"We are not, therefore, concluded by the declaration in the act that the franchise to collect tolls is not to be considered in estimating the sum to be paid for the property."

6. The dissolution of a corporation cannot impair the obligation of its contracts or the claims of its creditors; they still remain in full force and unimpaired by virtue of the constitution.

Mumma v. Potomac Company, 8 Peters, 281, 285–6.
People v. O'Brien, 111 N. Y. 2, 47–8.

II. The so-called repealing acts are unconstitutional because they deprive the Hydraulic Company, its bondholders and other creditors of their property without due process of law, and deny to them the equal protection of the laws.

I. A reserved power to repeal or amend the charter of a corporation does not permit the invalidation or annulment of a lawfully executed mortgage, or of coupon bonds issued thereunder, or of any other valid debt incurred or lawful contract made before the passage of the repealing act.

Sinking Fund Cases, 99 U. S. 700, 721.
City Railway Co. v. Citizens Railroad Co. 166 U. S. 558, 566–7.
Commonwealth v. Essex Company, 13 Gray (79 Mass.), 239, 252–4.
Detroit v. Howell Plank Road Co. 43 Michigan, 141, 147–8.
People v. O'Brien, 111 N. Y. 1, 36–7, 47–8, 48–9, 51.
Lord v Equitable Life Assurance Society 194 N.Y. 212, 2

In the Sinking Fund Cases, 99 U. S. 700, Chief Justice WAITE in delivering the opinion of the court, said (99 U. S. 721):

"Whatever rules Congress might have prescribed in the original charter * * * it retained the power to establish by amendment. In so doing it cannot undo what has already been done, and it cannot unmake contracts that have already been made * * *. It might originally have prohibited the borrowing of money on mortgage, or it might have said that no bonded debt should be created without ample provision by sinking fund to meet it at maturity. Not having done so at first, it cannot now by direct legislation vacate mortgages already made under the powers originally granted, nor release debts already contracted. A prohibition now against contracting debts will not avoid debts already incurred. An amendment making it unlawful to issue bonds payable at a distant day, without at the same time establishing a fund for their ultimate redemption, will not invalidate a bond already out. All such legislation will be confined in its operation to the future".

In Detroit v. Detroit and Howell Plank Road Co., 43 Michigan, 141, headnote:

"The reserved right to amend the charter of a corporation will not authorize the Legislature to add requirements that would be inconsistent with constitutional principles, as by depriving it of its property without due process of law."

COOLEY, J., in delivering the opinion of the court, says (43 Michigan 147–8):

"But there is no well considered case in which it has been held that a legislature, under its power to amend a charter, might take from the corporation any of its substantial property or property rights. In some cases the power has been denied where the interest involved seemed insignificant * * *."

"But for the provision in the Constitution of the United States which forbids impairing the obligation of contracts, the power to amend and repeal corporate charters would be ample without being expressly reserved. The reservation of the right leaves the State where any sovereignty would be if unrestrained by express constitutional limitations, and with the powers which it would then possess. It might therefore do what it would be admissible for any constitutional government to do when not thus restrained, but it could not do what would be inconsistent with constitutional principles. And it cannot be necessary at this day to enter upon a discussion in denial of the right of the government to take from either individuals or corporations any property which they may rightfully have acquired. In the most arbitrary times such an act was recognized as pure tyranny, and it has been forbidden in England ever since Magna Charta, and in this country always."

In People v. O'Brien, 111 N. Y. 2, it was held that an act dissolving a street railway corporation and repealing its charter (New York Laws of 1886, Chap. 268, p. 443), which had been granted for a limited term of years and was subject to repeal or amendment, was ineffectual as against its creditors and stockholders; and that acts (New York Laws of 1886, Chapters 271 and 310) "providing, in case of such a dissolution, for the taking away from the company of its street franchises, and for the winding up of its affairs by suit brought by the attorney general, and the appointment of a receiver therein, are unconstitutional and void."

The court say (111 N. Y. 36):

"The statutes upon which the action is predicated, confessedly assume the right and power of the legislature to wrest

from the company its franchises; to transfer them to other persons, and bestow their value upon the donees of the State. The statutes contemplate the absolute destruction of the property of the corporation, and the loss of its value to the creditors who have made loans in good faith upon the security of such property * * *. It is, therefore, urgently contended by the attorney general that none of the franchises of the corporation survived its dissolution, and that the mortgages previously given thereon, as well as all contracts made with connecting street railroads for the mutual use of their respective roads, fell with the repeal and could not be enforced.

" If it could be supposed for a moment, that this claim was reasonably supported by authority, or maintainable in logic or reason, it would give grave cause for alarm to all holders of corporate securities."

And further (p. 37) :

" We think that there are no reported cases in which the judgment of the court has ever taken the franchises or property of a corporation from its stockholders and creditors, through the exercise of the reserved power of amendment and repeal, or transferred it to other persons or corporations, without provision made for compensation."

And further, pp. 47–8 :

" It is also to be observed that in none of the provisions for repeal in this State is there anything contained, which purports to confer power to take away or destroy property or annul contracts, and the contention that the property of a dissolved corporation is forfeited, rests wholly upon what is claimed to be the necessary consequence of the extinction of corporate life. We do not think the dissolution of a corporation works any such effect. It would not naturally seem to have any other operation upon its contracts or property rights than the death of a natural person upon his (Mumma v. Potomac Co., 8 Pet. 281, 285).

" The power to repeal the charter of a corporation cannot, upon any legal principle, include the power to repeal what is in its nature irrepealable, or to undo what has been lawfully done under power lawfully conferred (Butler v. Palmer, 1 Hill, 335)."

And further, pp. 48–9 :

" It would seem to be quite obvious that a power existing in the legislature by virtue of a reservation only, could not be made the foundation of an authority to do that which is expressly inhibited by the Constitution, or afford the basis of a

claim to increase jurisdiction over the lives, liberty or property of citizens beyond the scope of express constitutional power."

And further, p. 51:

"If it is possible to conceive the idea of a repealable grant, certainly such a grant, accompanied with power to convey or pledge the interest granted, must, on the execution of the power, necessarily preclude a resumption by the grantor of the subject of the grant, or any right of property acquired under it. An express reservation by the legislature of power to take away or destroy property lawfully acquired or created would necessarily violate the fundamental law, and it is equally clear that any legislation which authorizes such a result to be accomplished indirectly, would be equally ineffectual and void."

People v. O'Brien was approved by this court in

Willcox v. Consolidated Gas Co., 212 U. S. 44.
Detroit v. Detroit Citizens St. Ry. Co., 184 U. S. 395.

2. An act repealing or amending the charter or powers of a corporation in order to abolish valid pre-existing debts or to abrogate lawful prior contracts, is unconstitutional, because as to the holders of those debts or contracts it is a denial of due process of law and a deprival of the equal protection of the laws.

In Lake Shore Railway Co. v. Smith, 173 U. S. 684, it was held that a Michigan statute amending the railroad law by requiring one thousand mile tickets to be sold for $20 in the Lower Peninsula, and for $25 in the Upper Peninsula, deprived the railroad company of its property without due process of law and denied it the equal protection of the law.

The Court say (173 U. S. 690):

"Assuming that the state is not controlled by contract between itself and the railroad company, the question is how far does the authority of the legislature extend in a case where it has the power of regulation, and also the right to amend, alter or repeal the charter of a company, together with a general power to legislate upon the subject of rates and charges of all carriers. It has no right even under such circumstances to take away or destroy the property or annul the contracts of a railroad company with third persons. Greenwood v. Freight

Co. 105 U. S. 13, 17; Commonwealth v. Essex Company, 13 Gray, 239; People v. O'Brien, 111 N. Y., 1, 52; Detroit v. Detroit and Howell Plank Road, 43 Michigan, 140."

In Fletcher v. Peck, 6 Cranch 87, Chief Justice MARSHALL, in delivering the opinion of the court, says (6 Cranch, 135):

"When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot devest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community."

3. To take private property for public use without making just compensation therefor is a denial of due process of law.

U. S. v. Lynah, 188 U. S. 446, 470–4.
C. B. & Q. Ry. v. Drainage Commissioners, 200 U. S. 561, 593.
People *ex rel.* Harvey v. Loew, 102 N. Y. 471, 476.

III. The cases holding that the property and charter of a corporation may be taken for public use, upon payment of "due compensation therefor" (105 U. S. 13, 22) are not in point.

In Greenwood v. Freight Co. 105 U. S. 13, "the charter of a street railroad company was repealed, and its franchises and track were transferred to another" corporation by an act providing "if the corporations cannot agree upon the manner and conditions of such entry and use, or the compensation to be paid therefor, the same shall be determined in accordance with * * * the laws relating to the taking of land by railroad companies and the compensation to be made therefor" (105 U. S. 15). Apparently the same persons held a majority of the stock of both companies, for after taking the property of the old company, they took no steps to enforce the payment of compensation therefor. In a stockholder's action it was held that the legislature had a right to repeal the charter "on making due compensation therefor" (105 U. S. 13, 22).

IV. Suppose the Hydraulic Company had been advised to "elect to present a claim against the said city" under and pursuant to the repealing acts (Michigan Local Acts, 1905, pp. 330, 409; pp. 30-31 of this brief). By the very terms of these acts its election to "present a claim" thereunder would have estopped it from setting up that the prohibition of any compensation for its franchise was unconstitutional.

Daniels v. Tearney, 102 U. S. 415, 421.
Grand Rapids and Indiana Ry. Co. v. Osborn, 193 U. S. 17, 29.
Mayor, etc., v. New York v. Manhattan Ry. Co., 143 N. Y. 2, 26-9.
Matter of Cooper, 93 N. Y. 507, 511-2.
Embury v. Conner, 3 N. Y. 511, 516-9.
1 Lewis Eminent Domain, 3 ed. § 311.

In Daniels v. Tearney, 102 U. S. 415, it was held that a party who availed himself of the provisions of a stay law ordinance of the Virginia convention of 1861 (which was unconstitutional because among other things, it impaired the obligation of contracts), was estopped from setting up that the ordinance or the bond he gave thereunder, were unconstitutional or invalid.

The court say (102 U. S. 421):

"It is well settled as a general proposition, subject to certain exceptions not necessary to be here noted, that where a party has availed himself for his benefit of an unconstitutional law, he cannot, in a subsequent litigation with others not in that position, aver its unconstitutionality as a defense, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit. In such cases the principle of estoppel applies with full force and conclusive effect."

Lastly. The judgment of the Supreme Court of the State of Michigan should be reversed and the proceeding dismissed.

HENRY A. FORSTER,
Of counsel for Thomas H. Keogh,
Plaintiff in Error.

Charter of Grand Rapids Hydraulic Company.

Laws of Michigan, 1849, p. 298. No. 223.

An Act to incorporate the Grand Rapids Hydraulic Company.

SECTION 1. Be it enacted by the Senate and House of Representatives of the State of Michigan, That George Coggershall, Thomson Sinclair, Charles Shepard, Canton Smith and James M. Nelson, and their present and future associates, their successors and assigns, be, and they are hereby, created a body corporate and politic, by the name of the "President and directors of the Grand Rapids Hydraulic Company," and are hereby ordained, constituted and declared to be, forever hereafter, a body corporate and politic in fact and in name; and by that name, they and their successors shall, and they may have continual succession, and shall be persons in law, capable of suing and being sued, pleading and being impleaded, answering and being answered unto, defending and being defended in all courts and places, whatsoever, in all manner of actions, suits, complaints, matters and causes whatsoever, and that they and their successors may have a common seal, and make, change and alter the same at their pleasure; and also, that they and their successors, by the same name and style, shall be in law, capable of purchasing, holding and conveying any estate, real and personal, for the use of said corporation, provided that the real and personal estate so to be holden, shall be such only as shall be necessary to promote or attain the objects of this incorporation.

SEC. 2. That the capital stock of the said corporation shall not exceed thirty thousand dollars, and that a share in the said stock shall be fifty dollars; and that subscriptions to the said capital stock shall be opened, and kept open under the direction of said president and directors, until the whole number of shares subscribed amount to six hundred shares, when the said president and directors (p. 299) may commence operation under this act, and may make thereafter, from time to time, such regulations concerning further subscriptions to stock, as to them shall seem proper to enable the said company to enlarge or carry into operation their works; and especially as to when further subscriptions to the capital stock may be

opened and made, and what amount of stock, from time to time may be subscribed, until the whole, or any part of said capital stock shall be subscribed.

SEC. 3. That the stock, property and concerns of said company shall be conducted and managed by five directors, who shall be stockholders, and residents of the said village of Grand Rapids, which directors shall hold their office for one year from the first Tuesday of May, in every year; and the said directors shall be elected on the first Tuesday in May in every year, at such time of day, and at such place within the village of Grand Rapids, as the directors for the time being, or a majority of them shall appoint; and public notice thereof shall be given by said directors, not less than twenty days previous to the time of holding the said election, by advertisement to be inserted in at least one public newspaper printed in said village; and the said election shall be made by such of the stockholders of the said company as shall attend for that purpose in their proper persons, or by proxy, which proxies shall be stockholders, and all elections shall be by ballot; and the five persons who have the greatest number of votes at any election shall be the directors: and if it shall happen at any election that two or more persons have an equal number of votes in such manner that a greater number of persons than five shall, by plurality of votes, appear to be chosen as directors, then the said stockholders hereinbefore authorized to vote at such election, shall proceed to ballot a second time and by plurality of votes determine which of the persons so having an equal number of votes shall be the director or directors, so as to complete the whole number of five. And the said directors as soon as may be after their election shall proceed in like manner to elect by ballot one of their number to be their president: and if any of the directors so to be elected, shall at any time remove out of the village of Grand Rapids, the office of such director or directors shall be considered as vacant: and if any vacancy or vacancies shall at any time happen among (p. 300) the directors by death, resignation, removal or otherwise, such vacancy or vacancies shall be filled, for the remainder of the year in which they may happen, by such person or

persons as the remainder of the directors for the time being, or the major part of them shall appoint: That the first directors shall be George Coggershall, Thomson Sinclair, Charles Shepard, Canton Smith and James M. Nelson, who shall hold their offices until the first Tuesday of May next: and the said first directors, at their first meeting shall proceed to appoint their president.

SEC. 4. That the directors shall have power to appoint the time and place of all meetings for the despatch of business, to appoint all such officers, agents, clerks, superintendents and servants, as they shall deem necessary for carrying into effect the powers by this act vested in said company, and to establish rules and regulations for and concerning the conduct and government of such officers, agents, clerks, superintendents and servants.

SEC. 5. That it shall be lawful for the said company and any person or persons employed by them or acting under their authority, to enter into and upon, and freely to make use of, for the sole purposes contemplated by this act, any land which may be necessary for the purpose of conducting a plentiful supply of pure, wholesome water to the said village, for the use of the inhabitants of said village, and to supply reservoirs for extinguishing of fires. Said supply of water shall be obtained from the springs of water in and about said village; from Cold Brook; from the lake or lakes, from which it has its source, or from either of them, and from no other source; and to erect any dam or other works across said Cold Brook or springs where they shall judge proper for the purpose of raising the water of said Cold Brook, springs, lake or lakes, and to construct, dig, or cause to be opened, any trenches for the conducting of such water from said springs, Cold Brook, lake or lakes, that they may see fit; and to raise and construct such dykes, mounds or reservoirs as they may judge proper for securing and conveying such supply of water as aforesaid to the said village. The said Grand River hydraulic company shall not use the water or improvements made or obtained under this act of incorporation for the purpose of propelling any machinery, or for any other purpose than that of supplying the village of Grand Rapids with a pure, (page 301) wholesome supply of water for household

purposes and domestic uses, and to supply reservoirs for the extinguishing of fires; and the said company shall not, in any manner, injure or interfere with any water power; and to agree with the owner or owners of any lands, tenements or hereditaments that may be damaged or affected by any of the said operations, for and about a reasonable compensation to be made to him, her, or them for such lands, tenements or hereditaments, or the use thereof, as may be used or occupied for the purposes aforesaid, or any of them, or for any damage which he, she or they or any of them may sustain, by the employing, diverting or obstructing any such stream or streams, or using any such lands, or the cutting, laying, raising or making any such reservoirs, aqueducts, canals, trenches, pipes, conduits, dykes or mounds as aforesaid, but in case of any disagreement, or in case the owner of any such lands, tenements or hereditaments, shall be *femme covert*, under age, *non compos mentis*, or out of the state, then it shall be lawful for the judges of the supreme court of this state, or any one of them, upon the application of either party, to nominate and appoint three indifferent persons to view, examine and survey the said lands, tenements and hereditaments, and to estimate the injuries sustained as aforesaid, and to report thereupon to the said judge or judges, without delay, and upon the coming of such report, and the confirmation thereof by the said judge or judges, the said president, directors and company shall pay to the said owners respectively, the sums mentioned in such report, in full compensation for the said lands, tenements and hereditaments, or for the injury sustained as aforesaid, as the case may be. And upon such payment, the property so taken and valued shall immediately thereupon vest in said company as fully as if the same had been transferred by lawful deed by the owner or occupier thereof, for such term of time as the same may be required for the purposes authorized by this act; and in case the party entitled to receive such money shall not appear before the said judge or judges, and make claim to such lands, or shall not appear to demand or accept the money assessed as the valuation in any such case, then a deposit with the treasurer of the county of Kent, of the amount of money assessed as the valuation or damages in manner as aforesaid, together with a certified copy of the said report,

shall be considered equivalent (page 302) to a payment or a tender thereof to the person entitled to the same; and the treasurer of said county shall receive and keep account of all moneys so received into the said county treasury, and shall pay them to the parties entitled thereto, on the order of the said judge or judges, for said county; and such assessment of damages when confirmed, shall have the effect of a judgment, and execution may be ordered to issue thereon against said company, in favor of the person or persons to whom damages were awarded in manner aforesaid, and confirmation thereof, at the expiration of sixty days from the time of such confirmation, unless prior thereto said company shall have satisfied the damages found or assessed in manner aforesaid. The said three indifferent persons to be appointed as viewers, and to appraise the damages as aforesaid, shall receive such compensation for their services as the said judge or judges may, in their discretion deem proper and just, which shall be paid by the said company upon the order of said judge or judges. And the said company and all those who have acted under them, shall be acquitted from, and freed from responsibility for or on account of any such injury. But nothing in this section shall be construed to grant any rights, or give any privileges inconsistent or repugnant to the constitution of this state or of the United States.

SEC. 6. Whenever application shall be made to the said judge or judges by either party to nominate three indifferent persons to view, examine and survey the said premises as hereinbefore prescribed, for the purposes of ascertaining and assessing said damages, previous notice of such application shall be given to the owner or occupier of such premises, either by personal service of such notice ten days before making such application, or by public advertisement, for three weeks previous to such application, in some newspaper printed in Kent county; and if there be no such paper printed in said county, then such notice shall be published in the state paper, if there be one; and if there be none, then in some newspaper nearest the place where such works are proposed to be constructed. Such notice to describe the lands, tenements and hereditaments proposed to be taken by said company, or touching which damages are to be assessed, by the section or quarter section, or any other legal subdivision, or if

in a village, by the section, block or number of the lot, or by some suitable or proper description. And (page 303) evidence of the publication of such notice may be perpetuated by an affidavit duly made by the printer or publisher of the newspaper in which such notice was published, such affidavit to be made within three months after the last publication of such notice, shall be *prima facie* evidence of such facts set forth.

SEC. 7. That it shall be lawful for the said company hereby incorporated, and for all and every persons employed by, or under them, for the purposes contemplated by this act, from time to time, to enter upon any lands contiguous or near to said stream, fountains, aqueducts, dams or other works, or the places which may be selected for, and intended to be used and employed for the same, with carts, wagons and other carriages, and beasts of draught and burthen and all necessary tools and implements both for executing and making, and also for altering and repairing said works, or any of them, and to take and carry away timber, stone, gravel, sand or earth, from the same, for the making, altering or repairing of the said works, or any of them, subject always to the making compensation for all actual damages thereby occasioned, either by agreement of parties or in the mode hereinbefore prescribed.

SEC. 8. That it shall be lawful for the president and directors of said company, from time to time, to make and establish such by-laws and ordinances as they may think fit and proper, and as may be consistent with the constitution and laws of this state and the United States, for conducting and managing the affairs of said company, and for conducting and preserving the said works and every of them, and for conveying, employing, distributing and disposing of the water so as to be conducted as aforesaid, and for carrying into effect all the objects and purposes of said corporation: and may also agree with the corporation of the said village of Grand Rapids, the inhabitants of said village, and others choosing to use or take said water, regarding the rates at which the same shall be paid for: Provided, That the said company shall within five years from the passage of this act, furnish and continue with no unreasonable delay, a supply of pure and wholesome water, sufficient for the use of all such citizens dwelling in the said village, as shall agree to take it on the terms to be demanded by said company: in default whereof, the said corporation shall be dissolved.

SEC. 9. That it shall be lawful for said directors to call nd demand (Page 304) from the stockholders respectively, all uch sums of money by them subscribed, or to be subscribed, t such times, and in such proportions as they shall see fit, nder pain of forfeiture of their shares, and of all previous ayments thereon, to the said president, directors and com- any.

SEC. 10. That if any person or persons shall wilfully do, or ause to be done, any act whatsoever, whereby the said works, or any pipe, conduit, canal, water-course, mound, plug, cock, reservoir, dyke, or any engine, machine, or structure, or any matter or thing appertaining to the same, shall be stopped, obstructed, impaired, weakened, or injured, the person or persons so offending, shall forfeit and pay to the said company treble the amount of damages sustained by means of such offense or injury, to be recovered by such company with costs of suit, and by action of debt in any of the courts of this state, which action shall in every instance be considered as transitory in its nature, and shall and may be triable in any country in this state.

SEC. 11. Said company shall be entitled to all the benefits, and subject to all the restrictions of chapter 55 of the revised statutes of 1846, so far as the same be applicable and not inconsistent with this act. The legislature may at any time hereafter amend or repeal this act.

Approved April 2, 1849.

(Laws of Michigan, 1849, pp. 298–304).

First Act Repealing Charter of Grand Rapids Hydraulic Company, Michigan Local Acts, 1905, p. 329. No. 455.

An Act to repeal an act entitled "An act to incorporate the Grand Rapids Hydraulic Company," approved April two, eighteen hundred forty-nine, and to provide for presentation and allowance of claims against the city of Grand Rapids for the value of the tangible property of said company at the time of the approval of this act.

The People of the State of Michigan enact:

SECTION 1. An act entitled "An act to incorporate the Grand Rapids Hydraulic Company," is hereby repealed to

take effect November one, nineteen hundred five: Provided, That for the purpose of closing up its affairs only it may be continued for one year thereafter.

SECTION 2. The Grand Rapids Hydraulic Company may at any time before January one, nineteen hundred six, and not thereafter, present a claim to the common council of the city of Grand Rapids for the value of the real and tangible estate owned by it, not including franchise, at the time of the approval of this act, and transfer such property to said city in consideration therefor. If the said company and the said common council shall be unable to agree upon the valuation of said property within thirty days thereafter, then such claim may be filed within the further time of thirty days, in the form of a claim in assumpsit in the superior court of Grand Rapids, and issue framed thereon in the nature of assumpsit. The rules and practice in suits of assumpsit shall be applicable thereto. Either party to such issue may take the same for review to the supreme court of the State, upon the questions of law raised upon the trial, or charge of the court made to a jury, if the same shall be tried before a jury. The amount finally awarded to said company against the city of Grand Rapids shall be a claim against the city to be paid in the (p. 330) same manner as other claims; Provided, That if the said Hydraulic Company shall not elect to present a claim against the said city and transfer its property to said city, it may, upon giving a bond with sufficient sureties to be approved by the common council to protect the city from any damages caused thereby, remove all of its tangible property from the streets, lands and alleys in said city, under the direction of the board of public works of said city, and in the event of any disturbance of the street or alley grades, or injury thereto, caused by said removal, it shall at the time of removal of its property therefrom cause the said streets, lands and alleys to be repaired and placed in as good condition as before.

Approved April 5, 1905.

(Local Acts Michigan, 1905, pp. 329, 330).

Second Act Repealing Charter of Grand Rapids Hydraulic Company. Michigan Local Acts, 1905, p. 408. No. 492.

An Act to repeal act number two hundred twenty-three of the laws of eighteen hundred forty-nine, entitled "An act to incorporate the Grand Rapids Hydraulic Company," approved April second, eighteen hundred forty-nine, and to provide for presentation and allowance of claims against the city of Grand Rapids for the value of the tangible property of said company at the time of the approval of this act.

The People of the State of Michigan enact :

SECTION 1. Act number two hundred twenty-three of the laws of eighteen hundred forty-nine, entitled "An act to incorporate the Grand Rapids Hydraulic Company," is hereby repealed to take effect November first, nineteen hundred five : Provided, That for the purpose of closing up its affairs only it may be continued for one year thereafter.

SECTION 2. The Grand Rapids Hydraulic Company may at any time before January first, nineteen hundred six, and not thereafter, present a claim to the common council of the city of Grand Rapids for the value of the real and tangible estate owned by it, not including franchise, at the time of the approval of this act, and transfer such property to said city in consideration therefore. If the said company and the said common council shall be unable to agree upon the valuation of said property within thirty days thereafter, then such claim may be filed within the further time of thirty days, in the form of a claim in assumpsit in the superior court of Grand Rapids, and issue framed thereon in the nature of assumpsit. The rules and practice in suits of assumpsit shall be applicable thereto. Either party to such issue may take the same for review to the Supreme Court of the (p. 409) State, upon the questions of law raised upon the trial, or charge of the court made to a jury, if the same shall be tried before a jury. The amount finally awarded to said company against the city of Grand Rapids shall be a claim against the city to be paid in the same manner as other claims : Provided, That if the said Hydraulic Company shall not elect to present a claim against the said city and transfer its property to said city, it may,

upon giving a bond with sufficient sureties to be approved by the common council to protect the city from any damages caused thereby, remove all its tangible property from the streets, lands and alleys in said city, under the direction of the board of public works of said city, and in the event of any disturbance of the street or alley grades, or injury thereto, caused by said removal, it shall at the time of removal of its property therefrom cause the said streets, lands and alleys to be repaired and placed in as good condition as before.

Approved April 25, 1905.

(Local Acts, Michigan, 1905, pp. 408–9).

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 58.

JOHN F. CALDER, DAVID A. CROW, JOHN E. MORE, THOMAS H. KEOGH, AND WILLARD KINGSLEY, PLAINTIFFS IN ERROR,

against

THE PEOPLE OF THE STATE OF MICHIGAN BY THE ATTORNEY GENERAL AT THE RELATION OF GEORGE E. ELLIS, MOSES TAGGART, AND SAMUEL A. FRESHNEY, DEFENDANTS IN ERROR.

MEMORANDUM FOR PLAINTIFF IN ERROR THOMAS H. KEOGH.

An affirmance of the ouster judgment will be conclusive against the bondholders' rights unless their rights are reserved.

People *vs.* Calder, 153 Mich., 725, 730, 731.
Scrafford *vs.* Gladwin Supervisors, 41 Mich., 648, 652.
City of New York *vs.* Bryan, 196 N. Y., 159.

People *vs.* Rensselaer & Saratoga R. R. Co., 15 Wend., 113.

Commonwealth *vs.* Tenth Mass. Turnpike Co., 59 Mass., 509, 512.

32 Cyc., 1445-6.

17 Ency. Pl. & Pr., 439.

New Orleans Water Works *vs.* Louisiana, 185 U. S., 353-4.

HENRY A. FORSTER,
Counsel for Thomas H. Keogh,
Plaintiff in Error.

Supreme Court of the United States

OCTOBER TERM 1960

JOHN F. CALDER, DAVID A. CROW, JOHN E. MORE, THOMAS H. KEOGH and WILLARD KINGSLEY.
Plaintiffs in Error.
vs
The People of the State of Michigan by the Attorney General at the relation of George E. Ellis, Moses Taggart and Samuel A. Freshney,
Defendants in Error.

No. 240 58.

Brief for Defendants in Error

MOSES TAGGART,
GANSON TAGGART,
Of Counsel.
FRANZ KUHN, Attorney General of Michigan.
Attorney for Defendants in Error.

Supreme Court of the United States

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JOHN F. CALDER, DAVID A. CROW, JOHN E. MORE, THOMAS H. KEOGH and WILLARD KINGSLEY.
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vs

The People of the State of Michigan by the Attorney General at the relation of George E. Ellis, Moses Taggart and Samuel A. Freshney,
Defendants in Error.

No. 240

BRIEF FOR DEFENDANTS IN ERROR.

Writ of error is sued out by the several plaintiffs in error for review of the decision and order of the Supreme Court of the State of Michigan. Eighteen errors were assigned upon the decision of the state circuit court on appeal to the state supreme court. (R. 34-38). Nine errors are assigned upon the decision of the state supreme court on writ of error to

this court. (R.-47-48). These are set out by plaintiffs in error, at pages 13 to 15 of their brief and classified under two heads (a), "that the action of the legislature was arbitrary and violated the obligation of the charter contract," and (b), "that the action of the legislature was capricious, oppressive and in conflict with the Fourteenth Amendment regarding the taking of property without due process of law."

In this case information in the nature of quo warranto was filed in the circuit court for the county of Kent to test the right of respondents to exercise the rights, privileges and franchises of a body corporate. Plea was filed to such information and demurrer filed to the plea, and the court entered an order (R. p 21), that "it is therefore considered and adjudged that the demurrer to respondents' plea be sustained and that the respondents have no authority in law to act as a body corporate or exercise the rights, privileges and franchise of a body corporate, and that said respondents be and they hereby are altogether excluded, ousted and prohibited from exercising or assuming to exercise corporate rights, privileges or franchises, or acting or assuming to act as a body corporate, and particularly under the name and style of the Grand Rapids Hydraulic company." From this order appeal was taken to the supreme court of the state of Michigan where such order was affirmed.

STATEMENT FOR DEFENDANTS.

Under the head "State of Case" attorneys for plaintiffs in error have gone at length into the record pleadings and cover 15 pages of their brief. Many of these allegations related to matters foreign to a legitimate issue, and under any view cannot be considered, we submit, by this Court. The question of regularity of method adopted by the state legislature to repeal the original franchise charter of 1849 and

construction of former state legislation is settled and foreclosed by the state supreme court decision. Discussion of the comparative merits of water furnished by the City of Grand Rapids and the Hydraulic Company, has no legitimate place, either in the original pleadings, or briefs and arguments before this court. (Plaintiffs' Brief 2-3). Nor has the court proceedings taken in 1886 and the decision of Justice Campbell of the state supreme court, reported in the 66th. Mich., 606, any better standing. The case referred to in 66 Mich., 606, was commenced by bill in equity, and the various questions there raised, are not the ones here involved. The right to repeal by the legislature was *expressly recognized by Justice Campbell* and on page 614, he said: "The only remedy for the grievance, if it is a grievence, is by resort to the legislature." In the act of repeal complained of, our legislature, has but followed Justice Campbell's suggested advice.

Plaintiffs attorneys have set out the pleadings at length but unless a clear violation of the federal constitution is shown to exist, they are not entitled to relief. Most of the arguments and allegations of the plea were as alleged in the demurrer and as held by both the state courts, frivolous, and incompetent and not proper pleading. (R. 13-18). A demurrer only admits facts well pleaded. *People v Cooper*, 139 *Mich.*, 461-68; *High on Extraordinary Legal Remedies*, sec. 729; State v Long, 91 Ind., 354; Attorney General v Bank, 2. Doug. (Mich.) 358; People v Spring Valley, 129, Ill., 46. The ruling of our state supreme court on these points is conclusive. That part of the plea alleging improper motives, undue influence, lack of investigation of the merits, etc., are set out at length as well as argument based thereon. All these allegations (Plaintiffs' Brief 9-11) under the decisions of state and federal courts cannot be considered. We notice them in another connection. These allegations of the plea were de-

murred to as immaterial, having no proper place in the plea. (R. 13-15.)

The plea shows the property in the hands of a federal court receiver, at the time of the action of the legislature repealing the charter of the Hydraulic Company. He and the officers of the company went to Lansing and were heard before the Governor and by members of the state legislature. They made effort to induce the Governor, not to approve the act in question upon such hearing. (R 8) The acts of the officers as well as those of the receiver and the alleged statements of members of the legislature were demurred to as incompetent for any purpose. "All matters set up in said plea other than those in a direct line of justification or attempted justification of respondents' exercise of the franchise in question or by way of anticipation of relators' answer or reply were demurred to, as improperly embodied therein." The demurrer states, "the franchise in question by its express terms was subject to repeal and any trustee or mortgagee took the same subject to notice, and had notice of such reserved right of repeal." The allegations of the fifth paragraph of the plea (R. 11) enumerated from "a" to "j" were demurred to as based on acts and alleged facts not shown by the official record and being no legitimate part of the plea. Exhibit "AA" of the demurrer, sets up a duly certified copy of all the proceedings of the state legislature relating to the passage of the repealing act in question.

LEGISLATIVE JOURNALS ARE CONCLUSIVE.

I.

Varying somewhat the order of discussion of plaintiffs' attorneys, as this is the most appropriate place for examination of the question, we call attention to the claim that the

legislature journals are not conclusive. (Plaintiffs' Brief 22-29).

We submit that the legislative journals are conclusive of what they show (1) because the supreme court of the state of Michigan has so held in this particular case, a finding which we think should be followed in this court, and (2) because the state as well as federal courts have recognzied the conclusiveness of legislative journals. For this reason we demurred to the plea and did not then, and do not now see any reason for changing the opinion entertained. Attorneys for plaintiffs (Brief 22) concede that "there is a strong presumption that the journals of a legislative body are a correct record of the proceedings; that they tell the truth and the whole truth," but insist that such presumption is not conclusive. They insist that the federal courts have the power when contract rights are involved to go behind the face of the legislative acts and journals.

Legislative journals are the only legitimate evidence of action taken.

Sutherland on Statutory Construction, sec. 30, 47, 50, 85

Chesapeake & Potomac Trans. Co., v Manning, 186 *U. S.,* 245.

Brewer v Blougher, 14 *Peters,* 178.

Burrows v Delta Trans. Co., 106 *Mich.,* 603.

Cooley on Const. Limitations 7 *ed. secs.* 240 *and* 257.

American Coal Co. v Consolidated Coal Co., 46 *Md.* 15.

Justice Cooley in his work on Constitutional Limitations, page 257, says:

"The courts must presume that legislative discretion has been used. If evidence was required it must be supposed that

it was before the legislature when the act was passed."

On page 258 of the same work he uses this language:

"And if any special finding was required to warrant the passage of any particular act it would seem that the passage of the act itself might be held equivalent to such finding. The motives of the legislators cannot be enquired into."

Sutherland on Statutory Construction, sec. 496, says:

"No issue of fact will be tried as to the motives of legislators voting for a law, or to impeach it on the ground of fraud or corruption either at the suit of a private person or the state." Citing

Doyle v Continental Ins Co., 94 *U. S.*, 535.

On page 541 Sutherland says.

"If the state has power to do an act its intention or the reason by which it is influenced in doing it cannot be enquired into. The argument that the revocation in question is made for an unconstitutional reason cannot be sustained. The suggestion confounds the act with an emotion or a mental proceeding which is not the subject of enquiry in determining the validity of the statute. An unconstitutional reason or intention is an improper suggestion, which cannot be applied to affairs of life. If the act done by the state is legal, is not in violation of the constitution or laws of the United States, it is quite out of the power of any court to enquire what was the intention of those who enact the law."

In *Flint & Fentonville Plank-Road Company v Woodhull*, 25 *Mich.*, 99, Justice Cooley uses this language:

"A review of legislative determination by the courts would therefore not only be indecorous and objectionable for the reasons already stated, but it would be eminently improper

also for the further reason that it could not possibly be heard on the same evidence. It is wholly foreign to any proper administration of law or justice, that the decision of a proper authority upon any subject should be liable to be reviewed by another tribunal which in such review is shut off from the sources of information to which the other had access."

Sutherland on Statutory Construction, sec. 85, declares that statutes cannot be held invalid on the ground that they are unwise, unjust, unreasonable or immoral or because opposed to public policy or the spirit of the constitution, citing

State v Gerhardt, 145 *Ind.,* 434.

Which latter case uses this language:

"All presumptions must be indulged in favor of the statute, and it is only when made to appear clearly and plainly that a statute violates some provision of the constitution, that it should be declared void."

This proposition is sustained by Cooley in his work on Taxation, 3 *edition, page* 588, and *Diamond Match Company v Ontonagon,* 140 *Mich.,* 186.

"The legislature, not the courts, determines and is alone responsible for the wisdom, propriety and possibility of statutes."

Sutherland on Statutory Construction, page 497, says:

"It is not to be presumed that the legislature have assumed the existence of a fact on which an act of legislation is based without evidence. On the contrary courts are bound to presume that they acted upon good and sufficient evidence, and that presumption is conclusive on the question of the validity of the act."

And further:

"The legislature is presumed to act with full knowledge of all facts upon which their legislation is based or to which it is to be applied.

"When there is in the law an express limitation to do a thing an inference cannot be made or sustained which will defeat the object of the law."

To the same effect is *Chesapeake & Potomac Transportation Company v Manning, supra,* Justice Brewer in giving the opinion of the court states:

"But it is well settled that the courts always presume that legislatures act advisedly and with full knowledge of the situation. Such knowledge cannot be acquired in other ways than by the formal investigation of the committee and courts *cannot enquire how the legislature obtained its knowledge. They must accept its action as that of a body having full power* to act and only acting when it has acquired sufficient information to justify its action."

The rule is expressly laid down in *Sutherland an Statutory Construction, sections* 30 *and* 47, that the legislative journals are the only evidence of the enactment of statutes and cannot be aided or contradicted by parol evidence.

To the same effect are:

Speer v Mayor of Athens, 85 *Ga.* 49; 9 *L. R. A.* 402.
Richie v Richards, 14 *Utah,* 371.
People v Dettenthaler, 118 *Mich.,* 599.
Attorney General v Supervisors, 89 *Mich.,* 552.
People ex rel Hart v McElroy, 72 *Mich.,* 446; 23 *L. R. A.* 340.
Cooley on Constitutional Limitations, 7 *ed, p* 193.
Attorney General v Rice, 64 *Mich.,* 385.

Legislative journals cannot be supplemented by evidence

of lack of notice of any prerequisite of legislation even. The language of Justice Cooley, quoted in *Speer v Mayor of Athens, supra,* is especially pertinent, where it is stated:

"Each house keeps a journal of its proceedings which is a public record and of which the courts are at liberty to take judicial notice. If it should appear from these journals that any act did not receive the requisite majority or in respect to it the legislature did not follow any requirement of the constitution, or that in any other respect the act is not constitutional, the courts may act upon this evidence and adjudge the statute void; but, whenever it has acted in apparent performance of legal functions every possible presumption is to be made in favor of the act of the legislature. It will not be presumed in any case from the mere silence of the journals that either house has exceeded its authority or disregarded the constitutional requirements in the passage of legislative acts, unless where the constitution has expressly required the journals to show the action, as for instance, where it requires the yeas and nays to be entered."

In *Hart v McElroy, supra,* the court said:

"We certainly cannot act upon anything not found in the journals, nor can we presume that any requirement of the constitution has not been fulfilled, unless the fact appears affirmatively in such journals, and every intendment is to be made in favor of the constitutionality of the passage of the act," citing

Attorney General v Rice, 64 *Mich.,* 385.
Stevenson v Colgan, 14 *L. R. A.* (*Cal.*) 459.

Nothwithstanding the authorities which we have cited state and federal, counsel insist that the legislative journals

are not conclusive, and seek to make a distinction between the attempt to annul a legislative contract and other legislation, and contend that they are not conclusive, citing, *New Jersey v Yard*, 95 *U. S.*, 104, *State v Cincinnati Gas Light Co.*, 18 *O. St.*, 262, *Cronise v Cronise*, 54 *Pa. St.*, 255. These authorities give no support to the contention of the learned attorneys for plaintiffs.

New Jersey vs Yard holds that a statute of a state which declares that all charters of corporations granted after its passage may be altered, amended or repealed by the legislature, does not necessarily apply to supplements to an existing charter which was enacted subsequently to the statute, nor does a provision that declares that this supplement and the charter to which it is a supplement may be altered or amended by the legislature, apply to a contract with the corporation made in a supplement thereafter passed. It does not apply to the questions here involved and particularly as the franchise of the Hydraulic Company had not been amended in this particular or modified so far as the right of repeal is concerned.

Of course the legislature that enacts a law can repeal it, and if there is a provision under which a contract has been made, then it comes within the federal constitution, but where the contract in terms expressly provides that the legislature may *repeal it,* that is a most important part of the contract and both the party acting under such law or franchise as well as assignee must acquiesce in it.

The case of Cronise v Cronise was under a special statute that gave to the legislature the right to enact laws annuling contracts of marriage, where the courts had not power to decree a divorce. It is in no sense parallel with the case at bar. Here the right of repeal was expressly reserved and was the exercise of a general no limited power.

The court in the case of *State vs. Gas Light & Coke Co.,*

supra, distinguishes between an attack upon a legislative act, enacted on account of improper motives, and an ordinance passed by a common council. This case which is an extreme one, sustains our position upon the question of state legislation involved, but even as an authority upon the question of a city ordinance it is criticized by the courts, as having little support. The language of Justice Cooley quoted by us as well as the various authorities cited, exclude any such showing, as that contended for by plaintiffs.

The case of *Flint & Fentonville Plank Road Co. v Woodhull,* 25, *Mich.,* 99, *cites McCulloch v State,* 11 *Ind.,* 424, where it was alleged that certain members whose names appeared on the journals of the house and voting for the bill were absent, and that some of those present who were reported as voting did not vote, and that the entries were made by mistake. It was held that the journals could not be impeached or contradicted. The case cites

People v Mahaney, 13 *Mich.* 481.

So in *Flint & F. Plank Road Co. v Woodhull, supra,* the court held to the same doctrine as in the Indiana case and repudiated the doctrine asserted by counsel for respondents, and while conceding that a charter of a private corporation is a law, it may also contain a compact between the state as one party and the corporation as the other, and that the legislature will exercise its own discretion and choose its own methods in obtaining the information it desires; that an act not in violation of any constitutional provision when assailed must be its own conclusive evidence of the justice, propriety and policy of its passage.

In the case of *People vs. Gardner,* 143 *Mich.,* 108, the court holds directly and positively, that the motives of a city council in adopting an ordinance in the exercise of its legis-

lative powers, cannot be enquired into for the purpose of invalidating the ordinance, though fraud is alleged, nor can they show lack of good faith in the passage of the act. The court there quotes from Justice Cooley this language:

"The same presumption that legislative action has been devised and adopted on adequate information and under the influence of correct motives, will be applied to the discretionary action of municipal bodies and of the state legislation, and will preclude, in the one case as in the other, all collateral attack."

The Ohio case is neither followed nor approved. It may be conceded perhaps, the court does not concede, that the council of a city may stand in a different light from that of the legislative body of a state. The legislature has authority to pass any act not prohibited by the constitution, while a municipality can pass only such ordinances as it is expressly or by necessary implication, authorized to pass.

The authorities conclusively hold, we submit, that the motives of the legislature or its members, or method adopted by it in bringing about the passage of the repealing act could not be enquired into or admitted in evidence. Such being the case then a pleading containing allegations of that character is incompetent and frivolous. Clearly the pleading cannot state and make an issue on motives and methods used by the legislature or persons instrumental in securing the passage of an act, that are inadmissible in evidence. The policy of relators was to eliminate by demurrer, those claims not properly in the record. The demurrer admits nothing that was not properly pleaded and material to the issue.

Mungler vs. Kansas does not support the contention of plaintiffs' attorneys. Justice Harlan, page 661, says:

"Courts are not bound by mere promises, nor are they misled by mere pretenses. They are to look at the substance

of things whenever they enter upon the enquiry whether the legislature has transcended the limits of its authority."

The case there involved the question of manufacture and sale of intoxicating liquors. Justice Harlan said:

"If then the state deems the absolute prohibition of sale within her limits of intoxicating liquors for other than scientific, medicinal and other purposes to be necessary for the peace and security of her citizens, the courts cannot without usurping legislative functions override the will of the people as thus expressed by their chosen representatives."

The case of *Fairbank vs. United States,* 181 *U. S.,* 283, involved a stamp tax on a foreign bill of lading and tax or duty on exports. It has no bearing on the questions here involved, although generally holding that what cannot be done directly cannot be done indirectly by legislation, which may very properly be conceded. They quote the language of Justice McKenna that "the living voice of the constitution cannot be silenced by incorrect and defective recitals in legislative journals." There is no evidence before the court, and nothing in the legislative journals themselves, the material part of which is attached to the demurrer, showing any "incorrect" or "defective recitals" of acts done by the legislature of the state of Michigan, in connection with the repeal of the act in question.

The case of *Postal Telegraph Co. vs. Adams,* 155 *Mich.,* 688, cited by counsel, involved the exclusion from the state of a corporation engaged in interstate commerce, the court holding that a corporation might subject its property to taxation, but not to unreasonable regulations. That may well be conceded, but it has no bearing upon the legitimate issues here involved, so far as we are able to discern.

II.

CONSTRUCTION OF STATE COURT DECISIONS BY FEDERAL COURTS.

In this connection, as several of these questions which counsel have discussed, have been passed upon by both state and federal courts, we may properly call attention to the rule of this Court.

The construction of the statutes of a state as well as the state constitution, is binding upon this Court on writ of error, involving the question whether the statute violates the federal constitution.

> *Howe Machine Co., vs. Gage*, 100 *U. S.*, 676.
> *Hall vs. DeCuir*, 95 *U. S.*, 485.

This point is expressly sustained in the late case of

> *Cargill Co., vs. Minn. exrel R. R. & W. Comrs.*, 180 *U. S.*, 452, *cited in*
> *Olsen vs. Smith*, 195 *U. S.*, 332.

In the latter case the court uses this language:

"For the purpose of determining the validity of the statutes in their federal aspect, this court accepts the interpretation given to the statutes by the state courts, and tests their validity accordingly."

In the case at bar, decided by our state supreme court and reported in the 153*rd. Mich.*, 726, that court passed directly upon the validity of the repealing act attacked, and the method of its enactment, and cites the cases of

> *People vs. Gardner*, 143 *Mich*, 108, *approvingly; also*
> *People vs. Hulburt*, 24 *Mich.*, 54.

The view taken by Justice Christency in the Hulbert case, as to the meaning of this constitutional provision in People vs. Hulburt, is borne out by the record of the Michigan Constitutional debates of 1850, pp. 594-5. It here appears that

"Mr. Witherell offered a resolution (notice) proposing to amend the provision applicable to corporations. The legislature was frequently applied to change the charters of corporations when little or nothing was known of such application or intention by the people until after it was done and the change made. This was frequently done by tacking on bills with different titles. His amendment required that public notice should be given in all cases where the corporation desired an amendment of its charter."

So it seems that the constitutional provision in question as well as the statute referred to by counsel and passed in accordance with it, does not apply where the amendment or alteration is at the instance of the legislature itself. If the broad claim for such statute and constitutional provision could be applied to the legislature and state in legislation changing or modifying franchises theretofore granted, it cannot be applied to legislation repealing a franchise under its express terms.

The latter case was decided by Justice Christency and related to the manner of amending franchises and the practice upon such legislative amendments, and the views of Justice Christency in that case are directly sustained in the former.

In *Howe Machine Co. vs. Gage*, 100 *U. S.*, 676, *the* supreme court of Tennessee had decided that a law imposing an annual tax on all peddlers of sewing machines and selling by sample, and "levying such tax upon all peddlers of sewing machines without regard to the place of growth or produce of material or of manufacture" was valid. This construction was sustained by this Court, holding that the statute as construed by the state court, did not discriminate in favor of

citizens of the state as against those of other states.

The practice of this Court, as laid down in reported cases, is to follow the construction of the highest courts of a state, upon state constitutions and statutes. When decisions of the state courts are conflicting, this court feels at liberty to adopt either decision.

Ohio Insurance Co. vs. DeBolt, 16 *How.* 416.
Randall vs. Brigham, 7 *Wall.* 523.
Yazoo etc. R. R. Co. vs. Adams, 181 *U. S.*, 580.
Elmwood vs. Marcy, 42 *U. S.*, 289.

And the fact that the court had adopted a different construction of a similar statute in another state, makes no difference in the rule.

Union Nat'l Bank vs. Bank of Kansas, 136 *U. S.*, 223.

The certified copy of records attached to the demurrer related to the second act passed by the legislature. The object of it was to avoid informality in the first act passed. (R. 18-19). As required by the rules of the legslature, Senator Fyfe gave notce that at some furture day he would ask leave to introduce a bill to repeal "An act to incorporate the Grand Rapids Hydraulic Company, approved April 2, 1849." (R. 17.). This notice as shown by the senate journal was given April 11th. Thereafter upon April 12th as required by the rules of the legislature the bill was introduced and passed by a two-thirds vote in the state senate with no opposing vote thereto. On April 13th such bill was sent to the house of the state legislature with a message from the secretary of the Senate that the bill had been passed by the senate and ordered to take immediate effect. Upon motion of Representative Ellis the rules were suspended and it was placed upon its pas-

sage. On April 17th the same was returned to the senate with the information that the bill had been concurred in by the house and the same was referred to the secretary for printing and presentation to the Governor, and on April 25th the senate was notified by the Governor that he had approved, signed and deposited such bill in the office of the secretary of state. (R. 17-18).

The statement in the plea that the bill was presented to the House of Representatives on March 28th evidently refers, if correct, to the introduction of the original bill that was passed but replaced by the later one. (R. 6). The plea states that a communication was made by the Mayor to the common council on March 20th, recommending that the legislature be induced to repeal the Hydraulic Company charter and that a bill was drawn in accordance with such recommendation, which according to the allegation of the plea eight days thereafter was presented to the legislature of the state.

All proceedings of the state legislature as well as of the common council of the City of Grand Rapids are made public as they are had and printed in the official papers. While we do not think it important whether the representatives of the Hydraulic Company read the papers or not, notwithstanding the allegations of the plea there can be no serious doubt that both the officers of the company, and its agents had full knowledge of the steps that were taken, both under Mayor Sweet's recommendation, and in the state legislature. The bill was passed and became a law under the rules applicable to such legislation.

Attorney General vs. Grand Rapids Sticky Fly Paper Company, 144 *Mich.*, 221, was authority for the demurrer to the plea, and *Matheuson vs. Grand Rapids*, 88 *Mich.*, 558, authority for attaching to the demurrer, a copy of the legislative journals on the passage of the repealing act.

III.

POWER TO REPEAL.

Upon page 15 of plaintiff's attorneys brief, they discuss the reserved power to repeal and the language of the act of 1849 that "the legislature may at any time hereafter amend or repeal this act." Counsel call attention to the reference in the act stating that the company shall be subject to the restrictions mentioned in Chapter 55 of the Revised Statutes of 1846, so far as the same are not inconsistent with the special incorporating act. They then quote from the Act of 1846, that "every act of incorporation passed shall at any time be subject to amendment, alteration or repeal at the pleasure of the legislature; provided, that no act of incorporation shall be repealed

The act of 1849 giving to the Hydraulic Company its unless for some violation of its charter or other default, when such charter shall contain an express provision limiting the *duration* of the same."

charter was new legislation not containing this provision of the Revised Statutes of 1846 referring to the repeal "at the pleasure of the legislature." If anything such language was broader than that of the Revised Statutes of 1846. We do not see how it can reasonably be asserted that an absolute authority to repeal is not as broad as an authority to repeal "at the pleasure of the legislature." As said by Justice Montgomery in

Smith vs. Railway Company, 114 *Mich.*, 460.

"The legislature possessed the power under the constitution, to repeal the statute; it could do this one day before the reorganization or the next day."

By the provisions of the act it could be repealed "*at any time.*" (Plaintiffs' Brief 42). This language was of broader im-

port if anything than a repeal at pleasure, though practically we think, the two identical. Counsel attempt a distinction without a difference. We have not at any time desired to read the language of the act of 1846 in this regard, into the franchise of the Hydraulic Company. If it were an added right, reserved, it might well be claimed to be included in the Hydraulic Company act.

From a careful examination of the case of *Greenwood vs. Freight Company*, 105 *U. S.*, 13, we can find no authority holding that legislation repealing a charter under absolute right of repeal reserved, is unconstitutional. This case was cited and considered by the State Court in the case at bar, 153 *Mich.*, 730.

As before suggested the case of *New Jersey vs. Yard*, contains nothing in support of plaintiffs' contention.

Nor are they aided by the case of *Lake Shore Railway Company vs. Smith*, 173 *U. S.*, 684, cited on page 17 of their brief. This case involved simply the "power of alteration" and not of repeal. The court held, as have various other courts, that the legislature has no right to destroy the property or annul the contracts of a railroad company with third person. A question of discrimination was involved. The legislature had established maximum rates and the legislation in question would have the effect of taking the management of affairs out of the hands of the company. The court said:

"To say the legislature has power to absolutely repeal the charter of the company and thus to terminate its legal existence, does not answer the objection that this particular exercise of legislative power is neither necessary nor appropriate to carry into execution any valid power of the state over the conduct of the business of its creature. To terminate the charter and thus end the legal life of the company does not take away its property, but, on the contrary, leaves it all to the

shareholders of the company after the payment of its debts."

We have no controversy with this doctrine.

Nor does the case of *Berger vs. U. S. Steel Corp.*, 63 *N. J. Eq.*, 809, add to the strength of the contention of plaintiffs. That case arose under the statutes of the state of New Jersey. The act in question provided that it and its amendments, should be a part of the charter of every corporation hereafter formed under it except in so far as the same was inapplicable. The court held that it was settled under the jurisprudence of that state, that the right reserved to amend, alter or repeal, extended *only to a modification or destruction of rights between the state and the corporation*, but that the rights of the stockholders, between themselves, could not be impaired except such impairment be required by public interest. This conceded, in effect, that the right of repeal was one between the state and corporation and might be exercised, but held the rights of the stockholders, between themselves could not be impaired. The court uses this language:

"Under the provisions contained in the sixth section of the act of 1846 retained in the legislation of 1895, it had been repeatedly held that the power was therein reserved to alter, or repeal charters for the benefit of the public."

Counsel say, that "the reserved power to amend or repeal private charters no matter in what language expressed, is not an unlimited one, but on the contrary, is encircled by constitutional limitations." As a general proposition for this argument we concede this. The right is not claimed to destroy vested interests, but if the act under which the corporation is organized, is repealed as to the body corporate, or its franchise as a corporation has ceased, any person who has dealt with the corporation has knowledge of exactly what may happen under such an *express reservation*.

The excellent work of *Morawetz on Private Corpora-*

tions recognizes this. *Morawetz, section* 1096. Morawetz quotes from *Chancellor Zabriskie in the case of Zabriskie vs. Hackensack et c. R. R. Co.,* 18 *N. J. Eq.,* 192, as follows:

"It (the legislature) can repeal or suspend the charter; it can alter or modify it; it can take away the charter; but it cannot impose a new one and oblige the stockholders to accept it. It can alter or modify the old one; but power to *alter or modify anything* can never be held to imply a power to substitute a thing entirely different. It is not the meaning of the words in their usual received sense. Power to alter a mansion house would never be construed to mean a power to tear down all but the back kitchen and front piazza and build one three times as large in its place."

The learned Chancellor conceded and his language is quoted approvingly by Morawetz that the legislature can repeal the charter.

The same distinction is made in *Yeaton vs. Bank of Old Dominion,* 21 *Grat.* (*Va.*) 593, where the court says:

"The power reserved by the legislature gives the right certainly to repeal or destroy, but so far as the right to alter or modify are concerned, it is nothing more than the ordinary case of stipulation that one of the parties to a contract may vary its terms with the consent of the other contracting party."

24 *Am. & Eng. Ency. of Law, p* 173, *note* 3, cites the case of *Oakland Paving Company vs. Hilton,* 69 *Cal.,* 485, and uses this language:

"When we say cease we mean it went out of existence as if repealed by valid act of the legislature. This is the primary meaning of repeal."

This distinction is recognized in

Black River Imp. Co. vs. Holway, 87 *Wis.,* 590.
Davenport vs. Magoon, 13 *Ore.* 7.
People vs. Sassovich, 29 *Cal.* 484.

In the language of Sutherland on Statutory Construction the right of repeal is the right "to *sweep away all existing law* on the subject, with which the repealing act deals," and withdraw the franchise proper but not necessarily to destroy vested interests in property of the company.

Shields vs. Ohio, 95 *U. S.,* 319, is cited on page 18 of plaintiffs' attorneys' brief. This court there expressly recognized the right to repeal a statute or franchise where the power to so repeal is reserved, and adds:

"Equity takes charge of the property and effects which survive the dissolution and administers them as a trust fund primarily for the benefit of the creditors. If anything is left it goes to the stockholders."

The court discusses the question "alteration and amendment" as a right *separate* from that of repeal. This language was quoted approvingly by the court in the *Sinking Fund, Cases,* 99 *U. S.,* 700, cited by counsel. Justice Waite deciding the case said the rules laid down were sustained by the weight of authority.

Stearns vs. Minnesota, 179 *U. S.,* 223, as well as the language of Justice Cooley, cited on page 18 of their brief, went to the question of taking property without due process of law and not the exercise of an express right to repeal a franchise which is a part of the contract. It is undoubtedly true as Justice Cooley says, that in the repeal of corporate grants "troublesome questions are liable to arise," but they are not questions that relate to the repeal or destruction of the franchise in accordance with the compact, but as to the disposition of the property of the corporation. Those questions are not before us at the present time.

Counsel cites *San Joaquin vs. Stanislaus Co.,* 113 *Fed Rep.* 930, on the claim that a reserved power cannot arbitrarily destroy a corporation, meaning, as we understand, cannot

arbitrarily destroy property. This is the fair construction of the opinion that the state cannot destroy property rights, and interests actually acquired and vested.—It does not hold, and if it did, it would not be sustained we think by the highest federal court, that under the reserved power to repeal such right cannot be exercised. On page 943 is quoted the language of Chief Justice Waite in the Sinking Fund Cases that

"It (the reserved right) cannot be used to take away property already acquired under the operation of the charter or to deprive the corporation of the fruits *actually reduced* to possession of contracts lawfully made."

This is not questioned. The court says further:

"The qualification that a statutory right embraced in the charter of a corporation must be reduced to possession to secure the constitutional protection against alteration and repeal is unquestionably a law of the grant."

The case of *McKee vs. Chautauqua Assembly*, 130 *Fed.* 536, cited by attorneys for plaintiffs at page 19 of their brief does not add strength to their contention, and only holds that which has not been questioned by relators. We have not claimed that vested rights could be divested by the repeal. That case cites the Sinking Fund Cases and gives the language of Justice Waite that, such repeal "cannot be used to take away property already acquired under the operation of the charter or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made."

Delaware R. R. Co. vs. Tharp, 5 *Harr.*, 454, which attorneys have cited upon the same proposition, does not extend to the point for which they seek to use it. The language of the statute was, "in case said company shall hereafter "misuse" or "abuse" the privilege hereby granted (i. e. charter) and shall be lawfully convicted of such misuse or abuse, the

legislature shall have power to revoke the charter and reassume the rights and privilges hereby granted." There the right to repeal by the legislature was not unqualified. Question of the abuse or misuse of the privileges granted had to be established. The court said:

"True this provision of the constitution reserves to the legislature alone the right to judge whether the corporation has abused its powers and thus to revoke charters, but a reasonable construction of the constitution is that this shall be done upon examination and trial before the legislature upon grounds stated."

In other words there must be a showing that there was an *abuse* of the privileges, and *conviction* before the right to revoke the charter was exercised.

Mayor vs. Twenty-Third Street Ry. Co., 113 *N. Y.*, 317, cited upon the same proposition was a case that involved a law requiring a street railway to pay into the treasury of the city one per cent on its gross earnings instead of a franchise fee theretofore prescribed. This was held permissible, but it was also held that a legislature could not deprive a corporation of its property or annul its contracts. That it could take away its franchise to be a corporation or prescribe the conditions on which it should live. The court uses this language in this case:

"But it may take away its franchise to be a corporation, and it may regulate its exercise of corporate powers. As it has the power to utterly deprive the corporation of its franchise to be a corporation, it may prescribe the conditions and terms upon which it might live and exercise such a franchise."

It only uses the word "reasonable" as applied to alteration of charters but not to the repeal of a franchise where such right is reserved.

On page 19 attorneys cite *Portland R. R. Co. vs. Deering,*

78 *Me.*, 61, to the effect that the court said they could not lay down an exact rule; that "each case depends upon its peculiar facts." In such case it was held not an unconstitutional exercise of power to require railroad corporations to build and maintain highway crossings laid out across their tracks. The question of *repeal of charter under right reserved was not involved.*

Attorneys then return to Michigan and cite *Detroit vs. Detroit & Howell Plank Road Co.*, 43 *Mich.*, 140, and say that the Michigan court "has spoken with man-like sturdiness on the merits." If the case were in point, as it is not, it could not be held to overrule the very recent decision of the Michigan supreme court in the case at bar. Great reliance is placed upon this case by plaintiffs in error. The state by new legislation undertook to remove a toll-gate in the City of Detroit, thereby depriving the plank road company of toll for a travel of two and one-half miles. Reference to the case shows that it was based upon the right of the legislature to "amend" the charter of the company. It involved an amendment of 1879 of Act 266, of the Laws of 1848. By the terms of this act it was to remain in force for 60 years after its passage. There was a provision for alteration, amendment or repeal by a two-thirds vote of the legislature. It was made subject to the provisions of the plank road act approved March 13, 1848, excepting as otherwise provided. Neither act 266 of 1848, or that of March 13, 1848, one section of which is made a part thereof, stand on the same footing as the one at bar. Under the act there in question for 30 years no alteration, amendment or repeal could be made unless made to appear to the legislature that the company had violated its provisions. The charter of the Detroit Plank Road Company was amended in 1853 and again in 1879. The revised statutes of 1846 to which we have referred placed no limitation upon the reservation of

right of repeal of charters not limited in their terms. By the terms of the franchise of the Hydraulic Company the legislature could repeal it "at any time." The act in question was termed an amendment. The act of 1875 forbade, however, without the consent of the local authorities, maintaining a toll house within the present or future limits of the city or village. It had, however, the effect to divest the company of property within the limits of cities or villages and hence was held invalid by Justice Cooley, who, in his opinion, asked whether the act of 1879 was a legitimate exercise of the "power to amend plank road company charters," and states it takes away the right of the company to collect toll within two and one-half miles of the city limits. He refers also to the case of

Commonwealth Co. vs. Essex Co., 13 *Gray*, 239.

to the effect that amendment or alteration of a charter cannot take away property or rights which have become vested, under the legitimate exercise of the power granted. Counsel refers to the provision of the Hydraulic Company charter making chapter 55 of the revised statutes of 1848 a part thereof. This we have referred to in another connection and it will be seen that it makes a distinction in the manner and method of repeal of charters granted for an unlimited and a limited time. If unlimited it could be repealed at any time without the showing required by limited charters covered by its proviso. The statute involved and discussed in the 43rd Michigan, is not that involved in the case at bar. The statute of 1848 made a distinction as to the manner and method of repeal of charters of limited time, and those of unlimited duration.

Attorneys for plaintiffs on page 20 of their brief says: "Of course the legislature on its own motion, if acting in good

faith could repeal this special charter. The courts in the first instance would presume such repealing act valid." We have shown by authority that the *presumption that the legislature acted in good faith is conclusive*, if nothing to the contrary appears upon the record. Counsel, however, insists that if it is charged that the legislature acted capriciously or arbitrarily, the court can enquire into the facts back of the face of the repealing act and consider whether the mode adopted by the legislature was suitable to the nature of the case. In other words counsel could interpolate into their pleadings any charge that they saw fit, and thereby raise an issue that must be passed upon by the courts. The statement of the proposition we think, is enough to show its absurdity, and lack of legal foundation.

They cite, however, on this proposition (brief p 21). *People vs. North River Sugar Refining Co.*, 121 *N. Y.*, 582. This was an action brought by the attorney general of the state to have the defendant corporation dissolved. The proceeding was to invalidate its charter upon the ground of illegal combination and trust, in violation of law. It was claimed that it had abused its powers. It had become a constituent element, as the judge deciding the case states, of a combination that had absorbed most of its corporate functions, and dictates the extent, manner and terms of its business activity; 16 other corporations had been drawn within the same combination for the business of refining sugar. After an extended discussion the court holds that the corporation had violated its charter and failed in the performance of its corporate duties and so awarded a judgment of dissolution. The case did not involve the question of repeal of a charter or franchise under a right reserved as in the case at bar. The discussion is interesting but not important or instructive upon the real issue here.

DISCUSSION OF POINTS FOR PLAINTIFF THOMAS H. KEOGH.

In this connection we may add something by way of reply to the argument of counsel for Mr. Keogh and of his authorities. The points made by him and authorities cited have been largely anticipated by what is before presented in this brief.

This learned counsel by showing that a franchise may be sold as property, contends that it is possessed of an elusive character, that enables it to escape the express reservation of right to repeal contained in the original contract. The contention we submit is more ingenious than sound. Justice Montgomery with "man-like sturdiness," deals in his opinion in the case of *Smith vs. Lake Shore & Mich. So. Ry Co., supra,* a stunning blow to this contention when he says, a company by changing its organization

"Cannot evade or avoid the terms or conditions of its fundamental law or the fundamental law of the state. If it cannot do it by consolidation it cannot do it by mortgaging or creating liens and thereby giving to such parties any greater rights than by it possessed."

From our brother's standpoint the mortgagee is not in position to complain, until he or the purchaser has reduced to possession this intangible right, something that may never occur. The authorities cited do not reach to the claim and contention made.

Detroit vs. Detroit Citizens Street Ry. Co., 184 *U. S.,* 368, cited by counsel, involved the question of right to reduce fares below 5 cents when such sum had been fixed as a maximum. The court there held in the absence of constitutional provision that there was no question as to the competency of the state legislature and authority of a municipal corporation to contract with a street railway company as to the rate of

fares and thereby bind for a specified period future councils from altering or interfering with such contracts. The language of the ordinance that fixed the rate of fare at 5 cents did not give the right to the city to reduce it below the rate established by the company within the limitation. Justice Peckham uses this language:

"The rate of fare having been fixed by positive agreement under express legislative authority the subject is not open to alteration thereafter by the common council alone under the right to prescribe from time to time the rules and regulations for the running and operation of the road."

The company in other words had the right to charge any rate up to five cents a mile for a single passenger and the city could not reduce it without the consent of the company. It was also held that the company could buy property that was needed in its business the title of which could be held beyond the period of its organization. That such asset would go to the shareholders after payment of debts. Referring to the original act Judge Peckham said it was a law "subject to alteration, amendment or repeal."

Counsel also cite *Wilson vs. Consolidated Gas Co.*, 212 *U. S.*, 19-44, a case holding that when rates are fixed by legislative authority there should be a fair return on the reasonable value of the property at the time of its being used. The case holds that franchises of public service corporations are property and cannot be taken or used without compensation. The case involved the constitutionality of two acts of the legislature of the state of New York. There is a lengthy discussion as to the way of determining a fair return on the amount invested. We do not see how that case goes to the point of the right of a state legislature to repeal a franchise where the right of repeal is a part of the original contract.

The late case of *Minnesota vs. Street Railway Co.*, 215 *U. S.*, 417, contains no new doctrine but reiterates the principles theretofore laid down by this court, that a contract or franchise authorizing a street railway company to charge a maximum fare of 5 cents, could not be controlled or changed by legislative action passed with the intent of reducing the railway fare. It in no way involves the question of repeal of a franchise *under express* reservation of repeal. It also holds that contract or property interests secured beyond the lifetime of a corporation do not prevent it from taking the property or franchise which would have expired with the corporation itself, and that at the end of its corporate life if such property were in *existence*, it would be an asset divisible among the shareholders after the payment of debts. It does not hold, however, that a limited franchise can be sold or transferred so as to extend its life beyond the express provision contained in its fundamental law.

Julian vs. Central Trust Co., 193 *U. S.*, 93, holds that the highest decision of a state court is not conclusive upon this court in determining rights secured under a decree of sale prior to the rendition of such decision. Under the quotation of counsel himself of the opinion in this case, the right to be a corporation is not sold. That is what is involved in the case at bar, the franchise right to be a corporation which has been repealed.

The case of *Vicksburg vs. Vicksburg Water Works Co.*, 202 *U. S.*, 453, cited on page 13 of counsel's brief, was one where the bill showed an intention by a municipality to deprive complainant, a water supply company, of rights under an existing contract by subsequent legislation, and it was held the city could not show any inherent want of legal validity in the contract. It was also held that power to mortgage the

franchise of a company includes the power to bring it to a sale and make the mortgage effectual although the corporate right to exist cannot be sold. We have no controversy with this rule, but submit that if such a sale were had it cannot clothe the original franchise with new life or extension of days. In the case at bar, however, there has been no foreclosure and no sale nor reduction to possession by the mortgagee, and what his prospective rights may be so far as the question here involved is concerned, is now unimportant.

The corporate right to exist is held not subject to sale in the above case. Clearly, therefore, it is not subject to mortgage and sale on possible foreclosure. The corporate right to exist is the one point involved in the case at bar, and the above case is convincing authority for our, not appellant's contention.

The case of *City Railway Company vs. Citizens Street Railroad Co.*, 166 *U. S.*, 557, involved the question of construction of a contract for use of streets for street railway purposes, as also the right of delegation by the legislature to city government of the right of repeal of such franchise, but not the question, as we view it, that is involved in the case at bar.

Grand Rapids & Indiana Ry Co., vs. Osborn, 193 *U. S.*, 17-29, is cited but for what purpose is not apparent. The court holds that the provisions in the Michigan railroad law for the creation of a new corporation upon the reorganization of a railroad by the purchaser at a foreclosure sale, did not constitute a contract within the impairment clause of the constitution of the United States. There is certainly nothing in this case that aids plaintiffs' contention.

Counsel cite *Memphis Railroad Co. vs. Commissioners*, to the effect that the franchise to be a corporation, is dis-

tinct from a franchise as a corporation. The latter may be mortgaged and passes to the purchaser on a foreclosure sale. Here however the contest involves the right to repeal the franchise of a corporation, and counsel in their brief have been contending it had prospective life, through the mortgagees, that might foreclose and obtain title. We concede that if there were default in a bona fida mortgage it might be foreclosd and sale had, but insist that the effect if it would not be to extend the franchise life of the corporation by reorganization or otherwise.

IV.

DUE PROCESS OF LAW.

Counsel for Thomas H. Keogh under the claim that the action of the Michigan state legislature was contrary to due process of law in connection with the claim that it impaired the obligation of contract, presents this point with others from pages 17 to 22 of his brief. Attorneys for the other plaintiffs in error under the heading "Due process of law" discuss also several questions as to the impairment of contracts, unconstitutional conduct of the state legislature and its methods, and present their points pages 32 to 37 of their brief. We have largely reviewed the several authorities cited in their briefs.

Under the heading "not due process of law" plaintiffs' attorneys, page 32, vehemently state and submit that "according to the plea, the designed scheme and clandestine procedure, coupled with the mode and manner adopted by the Michigan legislature in the pretended passage of the repealing bills, make the so-called enactments 'spurious statutes;' they are merely semblances of legal enactments; they are invalid; they cannot afford due process of law which was the intention

of the Fourteenth Amendment to require, in order to prevent deprivation of property by state action." Prefacing this vehement statement on page 30 they quote from the judgment of the circuit court stating that "respondents have no authority in law to act as a body corporate or exercise the rights, privileges and franchises of a body corporate, and that said respondents be and they are hereby altogether excluded, ousted and prohibited from exercising or assuming to exercise corporate rights, privileges or immunities."

This is the finding at which all of plaintiffs' discussion in the several courts has been aimed. It does not assume to pass upon the mortgage rights or interest or claims of possible future incorporators by reason of the foreclosure of a mortgage. This was what the supreme court of the state of Michigan *affirmed*, and while in its opinion some of the varied and vehement charges of the plea as elaborated by learned counsel for respondents are discussed, it *only affirmed these few lines which we have just quoted*. Other points in the opinion of the supreme court are set out by counsel on pages 30 to 32 of their brief.

Counsel start out in an attack upon the holding of the supreme court as to the right of respondents, the directors of the Hydraulic Company, to act as a corporation. They then branch upon a discussion of the *trust mortgage and coupon bonds*, none of which, so far as appears in the pleadings, were held or controlled directly or indirectly by the respondents in the case. This last discussion is elaborated and carried on from pages 32 to 38 inclusive of their brief.

Largely the discussion of counsel for Thomas H. Keogh, preceding his proposition that the action had by the state legislature of Michigan was without "due process of law," relates not to the effect of the judgment upon the original respondents the directors of the Grand Rapids Hydraulic Com-

pany, but rather its effect upon the mortgagees and bondholders who are not respondents and who have reduced *nothing to possession,* and whose rights at most are contingent. We have reviewed most of these authorities to which attention is there called in counsel's brief from pages 9 to 17. This discussion includes the taking of property without due process, compensation, etc. There has been no taking of any property of the Hydraulic Company, and there will not be under this act, but a repeal exercised by the legislature as authorized by the state constitution and original franchise under the construction of the highest court in the state of Michigan.

The proposition is made by the counsel that the acts passed by the legislature, are not constitutional, because they deprive the Hydraulic Company, its bondholders and other creditors of their property, without "due process of law" and denies to them the equal protection of the law. The judgment of the state courts deprives the directors of the Hydraulic Company *from acting as a corporation under a franchise which has been repealed,* without passing upon the rights of bondholders or creditors who were not and are not now properly before the court. We submit that the point raised on page 17 of counsel's brief is not pertinent to the issue. No decision of the court has been rendered, annuling any mortgage or coupon bond lawfully issued or otherwise, or any valid debt or contract of the corporation. This counsel follows along the same line of authorities as the attorneys for the other directors. With many of the propositions stated by counsel, to the effect that the repealing or amending of a charter cannot abolish valid pre-existing debts or abrogate lawful contracts we agree, but submit they are not involved in the issue before this court. Nor do the authorities which we have mostly reviewed, cited on pages 18 to 21 of

his brief, add to the force of his contention or sustain his position.

It is needless to discuss the claim that private property cannot be *taken* for public use without just compensation therefor. No one questions such proposition. When the legislature does what the contract franchise in terms provides, and exercises the right of repeal, it does not lie in the mouth of the respondents of the corporation, nor anyone claiming under them, to say that it has violated the contract itself. As stated by our supreme court in its decision, the section authorizing the Hydraulic Company to file a claim for its tangible proerty if it saw fit, was purely optional. It did not present any such claim, and hence such section is eliminated from any fair discussion of this issue. It is difficult, under the discussion had, to separate the several claims made by counsel for plaintiffs in error. Their counsel have not done so.

We have conceded from the first that vested rights cannot be divested by the repeal, and have claimed at all times that no additional rights could become vested after the repeal of the franchise, and have insisted in all of the courts that no claim of vested rights could legitimately be made, to impair or bar the rights *actually reserved of repealing the franchise,* a right to be exercised in the usual way, as it was, in the passage by the state legislature of the law attacked. We do not find either from the cases that we have cited, or examination of the authorities of the learned counsel for plaintiffs in error, that there is serious conflict in authority as to the legality of the repeal by the legislature. Such right of repeal has been reserved as to corporations in most of the states of the Union, if not all subsequent to the decision in the famous Dartmouth College case, by this court. The idea or argument that a company can avoid such right under its franchise by mortgage or otherwise, so as to destroy the reservations

has the merit of *novelty* at least. It can no more do so than a landowner can add to his title of which he may be seized by a conveyance of a larger interest, than that actually owned, or the transfer of the same to another party. Some of the following cases have been cited and they clearly sustain this position.

Cooley's Constitutional Limitations, 7 ed. pp. 285, 391, 398.

Attorney General vs. Looker, 111 *Mich.,* 498.

Detroit vs. Detroit & Howell Plank Road Co., 43 *Mich.,* 140.

Portland R. R. Co. vs. Deering, 78 *Mich.,* 61.

Comr. of Railroads vs. G. R. & I. Ry Co., 130 *Mich.* 248.

Village of Highland Park vs. Plank Road Co., 95 *Mich.,* 489-90.

Smith vs. Lake Shore, etc., Ry. Co. vs. Railway Co. 114, *Mich.,* 460-472.

Bissell vs. Heath, 98 *Mich.,* 472.

Grand Rapids vs. G. R. Hydraulic Co., 66 *Mich.,* 606-610.

Commonwealth vs. Essex Co., 13 *Gray,* 239.

Gardner vs. Hope Insurance Co., 9 *R. I.,* 194.

Parker vs. Railroad Co., 109 *Mass.,* 506.

Comrs. etc. vs. Holyoke, 104 *Mass.,* 446.

State vs. Maine Central R. R. Co., 66 *Me.,* 488.

Sprigg vs. Western Union Tel. Co., 46 *Md.,* 67.

Union Improv. Co. vs. Commonwealth, 69 *Pa. St.,* 140.

State vs. Comrs. 37 *N. J. L.,* 228.

Illinois Cent. R. R. Co. vs. People, 95 *Ill.,* 313.

Rodemacher vs. Mil. & St. Paul Ry Co., 41 *Iowa,* 297.

Yeaton vs. Bank of Old Dominion, 21 *Gratt.*, 593.
Ashuelot vs. Elliott, 58 *N. E.*, 451 : 45 *L. R. A.* 647.
Thompson on Corporations, sec. 89.
Henley vs. State, 98 *Tenn.* 665.
Market St. Ry. Co. vs. Hellman, 109 *Cal.*, 571.
State vs. North Cent. Ry. Co. vs. 44 *Md.*, 131, 165.
People vs. O'Brien, 111 *N. Y.*, 152.
W. Wis. R. R. Co. vs. Supervisors, 35 *Wis.*, 257.
Gorman vs. Pac. R. R. Co., 26 *Mo.*, 441.

And the federal courts recognize the same rule and the same right on the part of state legislatures to repeal charters of companies, where the right is reserved in the original franchise granted.

Tomlinson vs. Jessup, 15 *Wall.*, 454.
R. R. Co., vs. Maine, 96 *U. S.*, 499-511.
Miller vs. State, 15 *Wall.*, 478.
Holyoke Co. vs. Lyman, 15 *Wall.*, 500.
Sinking Fund Cases, 99 *U. S.*, 700.
Munn vs. Illinois, 94 *U. S.*, 113.
Hamilton Gas Light Etc. Co. vs. Hamilton City, 146 *U. S.*, 258-70.
Greenwood vs. Freight Co., 105 *U. S.*, 13.
Railroad Co. vs. Georgia, 98 *U. S.*, 359.
Wisconsin Etc. Ry. Co., vs. Powers, 191 *U. S.*, 379.
Lake Shore R. R. Co. vs Smith, 173 *U. S.*, 684.
Dartmouth College vs. Woodward, 4 *Wheat*, 518.
Merriwether vs. Gerritt, 102 *U. S.*, 472.
G. R. & I. Ry. Co. vs. Osborn, 193 *U. S.*, 17.

The cases cited by counsel for plaintiffs in error, where the proposition of repeal of a charter is involved, sustains the contention and the rule referred to in the above cases. Cooley in his work on Constitutional Limitations, referred to, says:

"These provisions are given protection from the time of the adoption, but the improvident grants theretofore made are beyond their reach."

While he acknowledges that there are difficulties that may arise, he cites a large number of cases on page 391 of the 7th edition of his work on constitutional limitations, to support their right of repeal, some of which we have already cited.

We have made no claim and the court has not held that we can take property without compensation, but at all times we have insisted that the right of repeal existing could not be impaired, although its exercise might incidentally affect the value of the property of the company. The distinction is clearly made by Justice Montgomery, one of the strongest men upon the supreme court bench of Michigan, in

Comrs. vs. G. R. & I. Ry. Co., supra.

He holds directly that the legislature has the power under the constitution to repeal the statute at any time. His views were sustained by this court in 193rd. U. S., 17. The discussion of this learned judge in

Smith vs. Lake Shore and Mich Cent. R. R. Co.

is illuminating of the propositions involved in the case at bar. He says among other things:

"Reservation of the right leaves the state where any sovereignty would be if unrestrained by express constitutional limitations, and with the powers which it would then possess,"

and follows it by the statement that no company by reorganization or consolidation

"Can avoid the terms and conditions of its fundamental law or the fundamental law of the state. If it can not do it by consolidation it cannot do it by mortgaging or creating liens thereby giving to such parties any greater rights than by it possessed."

We had supposed this was good law, and if so it is conclusive on our brothers' contention. A state has a right acting within the provisions of the constitution to impose its own conditons upon its grants and concessions.

Rogers vs. Port Huron, Etc. R. R. Co., 45 *Mich*, 460.

Cooley says in the Plank Road case that the stockholders when they entered such a corporation reserving the right to the legislature to amend, alter or repeal, "are as much bound by this constitutional provision as though it were contained in the articles of incorporation."

Thompson on Corporations, sec. 189.

So the mortgagee or transferee, however cheap the bonds of the company may have been sold, had knowledge of the fundamental law and the original franchise grant to the company. So the language of Justice Harlan equally applies in the 146*th U. S.*, 270 *that*

"A legislative grant to a corporation of special privileges, not forbidden by the constitution, may be a contract; but where one of the conditions of the grant is that the legislature may alter or revoke it, a law altering or revoking or which has the effect of altering or revoking the exclusive character of such privileges, cannot be regarded as one impairing the obligation of contracts, whatever may be the

motive of the legislature or however harshly such legislation may operate in any particular case upon the corporation or parties affected by it. The corporation by accepting the grant subject to the legislative power so reserved by the constitution, must be held to have assented to such reservation."

It is needless repetition to cite authority, but the language of the court *Re Lee Bank, 21 N. Y.*, 9, is pertinent:

"The legislature have reserved the power at any time to alter or repeal the charter or any of its provisions. The corporators accepted it on this condition and agreed that its provisions might be changed, and every purchaser of stock in this company has assented to these terms and has agreed to hold his shares subject to this liability to change."

So in the Hydraulic Company, not only the stockholders but any person obtaining rights or interests in the company's property take it subject to the right of the legislature to repeal the same.

State vs. Maine Cent. Railroad Co., 66 Me. 486, uses almost the identical language above quoted, citing

W. Wis. vs. Supervisors, 35 *Wis.*, 257.
Roxbury vs. Boston, etc. R. R. Co., 6 Cush. 424.
Holyoke vs. Lyman, 15 *Wall.*, 500.

to the effect that such reservation was not a violation of the prohibition of the constitution, and that

"The power may be exercised whenever it appears that the act of incorporation is one which falls within the reservation and that the charter was granted subsequent to the passage of the general law, even though the charter contains no such condition, nor any allusion to such reservation."

To the same effect is

Sprigg vs. Western Union Tel. Co., 46 Md., 67.

In the Dartmouth College case, *supra,* the court said of the corporation:

"It took the charter subject to the general laws and of course subject to such changes as might lawfully be made in such laws."

Gardner vs. Hope Insurance Co., 9 *R. I.,* 194.

The court said:

"The legislature has reserved the power at any time to alter or repeal the charter or any of its provisions. The corporation accepted it upon this condition and agreed that its provisions might be changed."

In *Greenwood vs. Freight Co., supra,* Justice Miller said:

"It (the franchise) may be altered by the same power and may be repealed. What is it that may be repealed? It is the act of incorporation; it is this organic law on which the corporate existence of the company depends that may be repealed, so that it shall cease to be a law."

And further:

"One obvious effect of the repeal of the statute is that it no longer exists; its life is at an end. Whatever force the law may give to transactions into which the corporations entered and which were authorized while the charter was in force, it can originate no new transactions depending on the power conferred by the charter."

If the life of the franchise is at an end and the corporation no longer exists while property rights and interests are not destroyed, what right and interest can the stockholder or the mortgagee, if perchance at some future time he becomes a purchaser of the property, possess under it? And the same language is reiterated in

Miller vs. State, 15 *Wall.* 478.
Tomlinson vs. Jessup, 15 *Wall.*, 454.
Holyoke vs. Lyman, 15 *Wall.*, 500.

We think the condition of the corporation and its property were stated succinctly by Justice Cooley on page 394 of his work on constitutional limitations, 7th edition, as follows:

"In many cases the property itself becomes valueless unless employment in the manner contemplated in the corporate grant may be continued, as in the case, for instance, of railroad companies and property, and whatever individual owners of such property may do without corporate powers, it must be competent for the stockholders to do after their franchises are taken away."

This clearly we think indicates what the stockholders or successors to their rights by way of foreclosure or otherwise may do. We concede, as we have before, that property actually acquired by the corporation either contracts, property or choses in action are not destroyed by the repeal or absorbed as part of the city or state property. This is recognized in

Coast Line R. R. Co. vs. City of Savannah, 30 *Fed.*, 646.

And authorities there cited.

Justice Field in the case of *Tomlinson vs. Jessup, said*:

"The reservation affects the entire relation between the state and the corporation and places under legislative control all rights, privileges and immunities derived by its charter directly from the state."

The court uses almost the same language in

Railroad Co. vs. Maine, supra.

In *Henley vs. State*, 98 *Tenn.*, 665, the court quotes from Justice Cooley that

"Except when the constitution has imposed limits on the legislative power it must be considered as practically absolute whether it acts according to the natural justice or not in any particular case. The courts are not the guardians of the rights of the people of the state except as those rights are secured by some constitutional provision which comes within the judicial cognizance."

Counsel have not pointed out wherein this legislation impairs the obligation of contracts. They have assumed ulterior motive on the part of the state to secure property without due process of law, and inject it improperly, we submit, into their plea. It was given an opportunity to assert a claim and secure compensation but it was not obligated to exercise such option, and the legislation stands as though no such option had been given, as our State supreme court has held. We submit that they have not pointed out a single proposition supported by law that sustains their contention. As was said by the supreme court of Tennessee in *Stratton Claimants vs. Morris Claimants*, 89 *Tenn.*, 497.

"He who would show the unconstitutionality of an act of the legislature must be able to put his finger upon the provision of the constitution violated."

They have made assertions, without foundation from a legal point of view, and built up their man of straw upon such false foundation. From their own viewpoint and claim and under the authority of *Memphis R. R. Co. vs. Commissioners*, they might in the future, they cannot in the present acquire the franchise and property of the Hydraulic Company, the corporate existence of which has been terminated by this repeal. Authorities upon what can or cannot be done, or ought or ought not to be done, or in condemnation

proceedings are superfluous and immaterial upon any real issue here involved.

Morwetz on Private Corporations, section 1112, contains the same clear statement of the other authorities which we have before cited.

In the proceedings of the legislature, as well as in the courts leading to the case at bar, there has been no effort to take property without due process of law or to take property at all, by the repealing act in question, or by state legislation other than as it might be incidentally affected by the exercise of the right expressly reserved to the legislature, as suggested by Justice Cooley and the authorities cited.

In conclusion upon this point with reference to the contention of counsel for plaintiffs in error as to the right to foreclose the mortgage when the time might come, we will add that such right has not been questioned by the courts or ourselves. In fact it is not before the court, either in the pleadings or decisions of the state courts. We have no controversy with the authorities cited on page 13 of brief of counsel for Thomas H. Keogh, that a sale might be made under a mortgage covering the general franchise of a corporation, as laid down in the authorities cited. That however does not go to the right *to be a corporation* or *to do business as a corporation,* and at most, we submit, only to the property on hand *at the time of repeal of the franchise of the corporation.* While conceding as we have before that vested interests, are not to be interfered with, they are interests that are *actually vested* at the time of the repeal if not at the time of the giving of the mortgage. As was said by Justice Waite in the Sinking Fund Cases, 99 *U. S.*, 720, it cannot be used to take away property already acquired under the operation

of the charter or to deprive the corporation of any vested right *actually reduced to possession under contracts made.*"

We think the discussion of this proposition is a little premature at this time as there may never be a purchaser at a foreclosure sale: "Sufficient unto the day is the evil thereof." When the time shall come we have no doubt the courts will protect whatever interest there may be of mortgagee or purchasers. The state circuit court held and it was affirmed by the supreme court that the property rights of the bondholders in the security were not impaired except as they might be incidentally affected by the dissolution of the corporation. The rule is laid down that property rights not actually reduced to possession can not be made the basis of claim or asserted as vested rights.

McKee vs. Chautauqua Assembly, 130 *Fed.*, 536.
San Joaquin vs. Stanislaus Co., 113 *Fed.*, 930.

If the holder of a mortgage or purchaser under it should obtain the valued property of this corporation, it would only get such property and rights as attached to it at the time of the repeal. While it is unnecessary to discuss the question, it would not secure, in our judgment, unlimited right to extend the plant of the company in the streets of the City of Grand Rapids, not theretofore occupied. Such rights were not reduced to possession under any contract made at the time of the repeal in the language of Justice Waite. This special proposition is also covered in the *Greenwood vs. Freight Company Case* discussed in another connection. Imaginary intangible interests or rights not reduced to possession, but based upon future expectations are not vested rights or interests that the court can protect.

There were evidently reasons entirely satisfactory to the state legislature leading up to the adoption of the repealing

act. It does appear that at the time of such action by the state legislature, the company was in the hands of a receiver, and the receiver with officers of the company were interested enough to go to see the Governor at Lansing to intervene in its behalf. One result of the legislation, it is fair to assume, lead to the disappearance of the receiver. It is altogether probable that the method of doing business by a receiver may have had to do with the act of repeal of the company's franchise. The legislature acted in the capacity of a Joshua to deliver the company out of the hands of a many years receivership.

There was another way in which this corporation could undoubtedly have been disposed of without the action of the legislature. *Section 9762 of the Compiles Laws of Michigan for the year* 1897, reads:

"Whenever any incorporated company shall have remained insolvent for one whole year, or for one year shall have neglected or refused to pay and discharge its notes, or other evidence of debt, it shall be deemed to have surrendered the rights, privileges and franchises granted by any act of incorporation, or acquired under the laws of this state, and shall be adjudged to be dissolved."

At the time of the session of the state legislature at which this repealing act was passed, the supreme court of the state of Michigan construed this section of the compiled laws of Michigan, and entered a judgment of dissolution against a corporation coming within it. See

People ex rel Atty. Genl. vs. Grand Rapids Sticky Fly Paper Co., 144 *Mich.*, 221.

Before the repealing act in question had taken full effect, this receivership was at an end, and the business and prop-

erty of the company were under the control and carried on by the directors of the Grand Rapids Hydraulic Company.

V.

CONCLUSION.

The information filed in the state circuit court stated, that "John F. Calder, David A. Crow, John E. More, Thomas H. Keogh and Willard Kingsley of the City of Grand Rapids, county of Kent and state of Michigan, for the space of, towit, twenty days last past, have acted and still do act under the name and style of the Grand Rapids Hydraulic Company as a corporation within this state * * * without then and there being legally incorporated," etc., and the attorney general prayed for due process of law against them, requiring them "to answer to the said people by what warrant they claim to act as a corporation as aforesaid." (R. p. 1).

Plaintiffs in error, respondents in the circuit court, filed a plea to such information, setting up divers and sundry things as reasons why they should not be divested of their authority, which have been fully discussed, (R. pp. 4-12)., and "pray judgment and that they may be adjudged to be the lawful directors, the president and directors of the Grand Rapids Hydraulic Company and the said David A. Crow, for himself, prays judgment and that he may be adjudged to have been a lawful director of the said Hydraulic Company from the time of his aforesaid election as a director until the time his resignation was accepted." etc. (R. p. 12).

To this plea the Attorney General demurred, following the practice in the *Grand Rapids Sticky Fly Paper Company Case, supra.* The circuit court judge held that the demurrer to respondents' plea, be sustained and that "the respondents

had no authority in law to act as a body corporate, or exercise the rights, privileges and franchises of a body corporate, and that said respondents be and they hereby are altogether excluded, ousted and prohibited from exercising or assuming to exercise corporate rights, privileges or franchises or acting or assuming to act as a body corporate, and particularly under the name and style of the Grand Rapids Hydraulic Company." (R. p. 21.)

From this decision the directors of the said Grand Rapids Hydraulic Company took an appeal to the supreme court of the state of Michigan, and in the order entered the supreme court stated, "It appearing to this court that in said record and proceedings, and in the giving of judgment in said circuit court there is no error; therefore, it is ordered and adjudged that the judgment of the said circuit court for the county of Kent be and the same is hereby in all things affirmed." (R. p. 43).

These few brief paragraphs give the *gist* of the complaint-the pleadings and the decisions of the state courts, and what was legitimately there involved before the courts. From such order of the supreme court plaintiff in error bring writ of error to this court for its review of the order of the highest court of the state of Michigan.

We submit that, only if the repealing act is a *clear violation of some* federal constitutional provision must it fall. This is the rule laid down by Justice Cooley, and uniformly recognized by the courts. The Hydraulic Company, we submit, has no legal standing. To be in doubt is to solve the doubt in favor of the repealing act. On the question before this court the authorities do not raise a doubt. It has not been shown that any condition or fact under the franchise act, state legislation or state constitution is necessary to be established before the exercise of right of repeal. Such being

the fact no allegations of the answer as to motives or methods to secure the legislation can have any bearing upon the repealing act, not otherwise objectionable. The presumption is that the legislature had reason for the repeal, whether it was the company's slender hold on life, its control by a federal receiver or other reason is not material as the same is not open to investigation. We submit the act was valid and that the judgment of the court below should be affirmed:

(1). Because the proceedings for its adoption under the construction of the state courts were regular.

(2). Because under the reservation itself it could be repealed "at any time."

(3). We concede the repeal does not destroy vested rights and property of the company but it does withdraw the franchise and destroy the corporate existence.

(4). If at any time vested rights of the Hydraulic Company are threatened, then and not until then, can the owner call on the courts for protection.

Respectfully submitted,

FRANZ KUHN,

Attorney General

MOSES TAGGART,
GANSON TAGGART,

Of Counsel.

Supreme Court of the United States

OCTOBER TERM 1910

JOHN E. MORE, THOMAS H. KEOGH JOHN F. CALDER, DAVID A. CROW, and WILLARD KINGSLEY,
Plaintiffs in Error

vs.

The People of the State of Michigan by the Attorney General at the Relation of George E. Ellis, Moses Taggart and Samuel A. Freshney,
Defendants in Error

No. 58.

Supplemental Brief for Defendants in Error

FRANZ KUHN,
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Authority having been cited by plaintiffs in error we make the further suggestions thereon, and upon other points in the case.

The case of **Omaha vs. Omaha Water Co., 30 Sup. Ct. Rep. 610,** is cited as having an important bearing on the case at bar. This authority does not appear to give any added light to the contention. There a company was given the

right by ordinance to establish and operate water works. At the end of 20 years the city of Omaha was given the right to purchase the works at an appraised valuation to be fixed by three engineers, one selected by the city, one by the company and the third by the two other engineers. Nothing was to be paid for the unexpired franchise in the event of such purchase. The city elected to purchase and appraisers were selected. An award was made and rejected by the city. This court held that the condition of the plant as a going concern should be considered under the contract as fixing the valution.

Here there is no proposition pending to purchase by negotiations or condemnation the property or franchise of the Hydraulic company. The sole and only question in this record is, have the officers of the Hydraulic company the right to act as a corporation under the repealing act of the legislature of the state of Michigan?

I.

POSITIONS OF PLAINTIFFS' COUNSEL.

Counsel for four of plaintiffs say, "Of course the legislature on its own motion, if acting in good faith, could repeal this special charter." (Plaintiffs' Brief p 20.) And further "the courts in the first instance would consider such repealing act valid." (I b) On page 22 they say, "There is a strong presumption that the journals of the legislative body are a correct record of the proceedings; that they tell the truth and the whole truth."

We replied to this on pages 5 to 10 of our original brief. We have shown that this presumption under the authorities cited, both in Michigan as well as outside, is conclusive. The language of Justice Cooley, quoted on page 9 of our original brief, covers the whole ground. The learned counsel for Mr.

Keogh does not join with his associates in the contention of misconduct on the part of the legislature and city officials. Evidently he takes another view of the power of the courts to set aside state legislation. On page 17 of his brief he tacitly concedes the right of the state legislature to end the charter by repeal. At least he does not deny it, but bases his contention upon the assertion that the repealing acts are unconstitutional, "because they impair the obligation of contracts in addition to the repeal of the charter." He assumes that the act takes valuable property and vested rights away from the stockholders and creditors of the company.

The act (and we refer to the later one) neither compelled the company to file a claim against the city nor remove its property therefrom. Neither the circuit or the state supreme court held that it could have that effect, but on the contrary gave to it another construction. The information filed did not tender or raise this question. The construction of this statute by the state supreme court covers and should under the authorities cited, be conclusive. Referring to this contention, Justice Carpenter, for the state supreme court said:

> "The repealing act does not take from the corporation any personal or real property acquired during its legal existence. It does take from it this and **only this, its right to continue to be a corporation.** It takes from it no right, franchise or power which does not depend for its existence upon the granting clause of the charter and this it had a legal right to take. (105 U. S. 21). These rights it obtained from the legislature of the state of Michigan. By its terms, the law granting these rights, might at any time be repealed by the legislature. The corporation would exist until and only until the legislature repealed the law creating it. The life of this corporation expired according to the terms of the charter with the repeal of the law. Any argument that the repeal destroyed any constitutional right rests upon the impossible assumption that the corporation had a legal right to exist for a term longer than that specified in its charter. It had no such right." (R pp. 41-42).

The court then passes to the attack and charges of unlawful conduct on the part of city officials, and held, as it has held for years, that such claim "cannot be invoked in this case." (R p. 42). Then it takes up the alleged unconstitutional feature of permission to present a claim against the city and says,

> "It is contended that this provision is unconstitutional because it permits property to be taken for the public without the determination of necessity as provided in the constitution and that the compensation provided therein is unlawful and inadequate. It is a sufficient answer to each of these claims to say that this provision is not compulsory. It has no force unless the corporation chooses to accept it. If the corporation does accept, it voluntarily sells its property on the terms stated in the provision. To this there is no constitutional objection. (R pp. 42). The incorporators did not choose to accept it and did not file any claim under the act. The reason is given, we suppose on page 22 of Mr. Forster's brief.

II.

The Legislative Act.

From pages 5 to 14 of our original brief we have answered the attacks upon the repealing statute, by authorities that appear to us conclusive. We wish to add a few words upon the alleged ignorance of the officers of the Hydraulic company of the proposed legislation, although that is not really material.

To the alleged "secret and carefully planned fraudulent scheme to crush the Hydraulic Company," we say there is no evidence or competent allegation even to support the claim. It is stated that the Hon. Edwin F. Sweet, mayor of the city, sent a communication to the council recommending that it ask the legislature to repeal the company's charter, and that the council instructed the city attorney to draw a bill, etc.

The council proceedings of the city are published in the official papers of the city. It is positively required to make contracts with one or more papers of the city to do the printing of its official proceedings. (City Charter, Sec. 137). Courts take judicial notice of the city charter and its requirements. So the officers of the Hydraulic company did have notice of the action of the mayor and council, **constructive, if not actual.**

If an issue must be raised upon every possible assertion, however incompetent or irrelevant, of the irrepressible pleader there would be no end of issues and pleading. The object of a legitimate demurrer is to cut out superfluous allegations.

III.

Questions Before the Court

We submit there is only the question of right of repeal of the corporate franchise of the Hydraulic Company and the right of the directors to act as a body corporate before this court. The information alone raised that question. Both state circuit and supreme courts only passed upon that question, and none other. The rule has been laid down that "questions not directly involved in an appeal and not necessary to the final administration of the case will not be considered by the court."

3 Cyc. 223.
Grant vs. Dryfus, 52 Pac. Rep. 1074; 98 Cal. 603.
Phillips vs. Kalamazoo, 53 Mich. 33.
Johnson vs. Towsley, 13 Wall. 72.

It does not appear upon this record that any federal question was decided other than the right of repeal of the corporate franchise, a right expressly reserved in the state act of 1849. This involved no federal question under the

authorities both state and federal. To give this court jurisdiction it must appear affirmatively on the record not only that a federal question was raised, but that its decision was necessary to the judgment or decree rendered in the case.

Detroit Ry. Co. vs. Guthard, 114 U. S. 133.

Justice Waite in that case uses this language, "It is what was actually decided that we are to consider, not what might have been decided." He also holds (page 137) that the opinion of the state court as to what was decided is controlling.

Only questions raised and decided in the state court can be assigned as error. An assignment of error cannot avail to present a federal question where there is an entire absence in the record showing that such question was decided in the state court.

Fowler vs. Lamson, 164 U. S., 252.

The certificate of the Chief Justice of the state supreme court that a federal question was involved is not properly a part of the record and is in itself insufficient to confer jurisdiction, in this court as showing a federal question, that otherwise would not appear from the record to have been brought to its attention.

Home for Incurables vs. New York, 187 U. S. 155.

Justice Waite, speaking for the court, said, page 158:

> "If our jurisdiction is invoked on the ground that the judgment of the state court has denied a right, title, privilege of immunity secured by the constitution of the United States it is essential under existing statutes that such right, title, privilege or immunity shall have been specially set up or claimed state court.

It appears affirmatively in the opinion of our state supreme court, that it only passed upon the simple question of the right of incorporation and use of the corporate name by plaintiffs in error.

IV.

STATE COURT CONSTRUCTION.

Aside from the construction of the legislative acts by the supreme court of the state of Michigan, the authorities state and federal cited in our original brief we think amply sustain the decision of our supreme court. The construction of state statutes by the highest courts of the state, are followed by this court. (Original Brief pp. 14-18).

The construction of the Michigan supreme court fully sustains (1) the validity of the legislative enactment and that it conforms to state requirements, (2) the conclusiveness of the legislative journals and record bearing upon said enactment, and (3) the construction of the act by the supreme court is conclusive upon the right of repeal and that no vested rights are affected by the repeal.

Respectfully submitted,

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MOSES TAGGART
GANSON TAGGART,
Of Counsel.

CALDER *v.* THE STATE OF MICHIGAN, *Ex rel.* ATTORNEY GENERAL.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 58. Argued November 29, 30, 1910.—Decided December 12, 1910.

This court does not inquire into the knowledge, negligence, methods or motives of the legislation if, as in this case, the statute is passed in due form; and where the statute repeals the charter of a corporation under the reserved power of repeal, the only question here is whether the statute goes beyond the power expressly reserved.

A corporation contracts subject, and not paramount, to reservations in its charter and cannot, by making contracts or incurring obligations, remove or affect such reservations.

A franchise given by a city to a public service corporation does not enlarge the right of the corporation to exist as against an expressly reserved power to repeal the charter, even if the corporation has mortgaged such franchise.

In this case, *held* that the question of parties is not open in this court. 153 Michigan, 724, affirmed.

THE facts are stated in the opinion.

Mr. Henry A. Forster and *Mr. Willard Kingsley*, with whom *Mr. John E. More* was on the brief, for plaintiffs in error:

The franchise of a public corporation to operate its

plant or works is separate and distinct from its franchise to be a corporation, and is transferable as such independently of the life of the original corporation. *Detroit* v. *Detroit Citizens' Street Ry. Co.*, 184 U. S. 368, 394, 395; *Minneapolis* v. *Street Ry. Co.*, 215 U. S. 417, 430; *People* v. *O'Brien*, 111 N. Y. 2, 36–38, 40, 47; *Suburban Rapid Transit Co.* v. *Mayor*, 128 N. Y. 510, 520; *Miner* v. *New York Central & H. R. R. R. Co.*, 123 N. Y. 242, 250; *Detroit Citizens' St. Ry. Co.* v. *City of Detroit*, 12 C. C. A. 365, 370; *S. C.*, 64 Fed. Rep. 628, 633; *Lord* v. *Equitable Life Assurance Society*, 194 N. Y. 212, 225, 228.

A corporate franchise cannot be separated from the lands or works essential to its enjoyment by the sale of the latter; because to separate its tangible property from its intangible property, would impair its creditors' rights. *Gue* v. *Tide Water Canal Co.*, 24 How. 257, 263; *Hammock* v. *Loan and Trust Co.*, 105 U. S. 77, 89, 90; *People* v. *O'Brien*, 111 N. Y. 2, 47.

Upon the dissolution of a corporation its property becomes a trust fund for the benefit of its creditors. *Citizens' Savings Co.* v. *Ill. Cent. R. R. Co.*, 205 U. S. 46, 55; *Mellen* v. *Moline Iron Works*, 131 U. S. 352, 366, 367.

Under the law of Michigan, public service corporations are authorized to mortgage their franchises, hydrants, pipes, poles, wires and rails in the public streets. The purchaser of the franchise may operate it in accordance with its provisions. *Telephone Co.* v. *St. Joseph*, 121 Michigan, 502, 508; *Detroit* v. *Mutual Gas Light Co.*, 43 Michigan, 594, 599, 605; *Joy* v. *Plank Road Co.*, 11 Michigan, 155, 165; Michigan Rev. Stat., 1846, c. 55, §§ 9–16, 212; *Railroad Comm.* v. *Grand Rapids*, 130 Michigan, 248.

The right of a public service corporation to mortgage its franchise and privileges (though not its right to be a corporation) necessarily includes the power to bring the franchise and privileges to sale to make the mortgage

effectual. The purchaser at the sale acquires a good and valid title to the franchise, although the corporate right to exist may not be sold. *Vicksburg* v. *Waterworks Co.*, 202 U. S. 453, 464; *Julian* v. *Central Trust Co.*, 193 U. S. 93, 106; *New Orleans R. R. Co.* v. *Delamore*, 114 U. S. 501, 507; *Memphis R. R. Co.* v. *Commissioners*, 112 U. S. 610, 619.

Franchises of public service corporations are property and cannot be taken or used by others without compensation. *Willcox* v. *Gas Co.*, 212 U. S. 22; *Wilmington R. R. Co.* v. *Reid*, 13 Wall. 264.

A statute separating the tangible property of a corporation from its franchise, and taking the former for public use while forbidding any compensation for the latter, is unconstitutional. The legislature may determine what private property is needed for public use, but the question of compensation is a judicial one. The legislature may neither say what compensation shall be made nor fix the rule of compensation. *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 327; *Vanhorne* v. *Dorrance*, 2 Dall. 304, 316; *Matter of New York*, 190 N. Y. 350.

The dissolution of a corporation cannot impair the obligation of its contracts or the claims of its creditors; they still remain in full force and unimpaired by virtue of the Constitution. *Mumma* v. *Potomac Co.*, 8 Pet. 281, 285, 286; *People* v. *O'Brien*, 111 N. Y. 2, 47, 48.

The so-called repealing acts are unconstitutional because they deprive the Hydraulic Company, its bondholders and other creditors of their property without due process of law, and deny to them the equal protection of the laws.

A reserved power to repeal or amend the charter of a corporation does not permit the invalidation or annulment of a lawfully executed mortgage, or of coupon bonds issued thereunder, or of any other valid debt incurred or lawful contract made before the passage of the repealing

act. Cases *supra* and *Sinking Fund Cases*, 99 U. S. 700, 721; *City Railway Co.* v. *Citizens' Railroad Co.*, 166 U. S. 558, 566; *Commonwealth* v. *Essex Co.*, 13 Gray, 239, 252; *Detroit* v. *Howell Plank Road Co.*, 43 Michigan, 141, 147.

An act repealing or amending the charter or powers of a corporation in order to abolish valid preëxisting debts or to abrogate lawful prior contracts, is unconstitutional, because as to the holders of those debts or contracts it is a denial of due process of law and a deprival of the equal protection of the laws. *Lake Shore Ry. Co.* v. *Smith*, 173 U. S. 684; *Commonwealth* v. *Essex Company*, 13 Gray, 239; *Fletcher* v. *Peck*, 6 Cranch, 87.

To take private property for public use without making just compensation therefor is a denial of due process of law. *United States* v. *Lynah*, 188 U. S. 446, 470; *C., B. & Q. Ry. Co.* v. *Drainage Commissioners*, 200 U. S. 561, 593; *People ex rel. Harvey* v. *Loew*, 102 N. Y. 471, 476.

The cases holding that the property and charter of a corporation may be taken for public use, upon payment of "due compensation therefor" are not in point.

Even if the Hydraulic Company had elected to present a claim against the city under and pursuant to the repealing acts, by the very terms of those acts such action would have estopped it from setting up that the prohibition of any compensation for its franchise was unconstitutional. *Daniels* v. *Tearney*, 102 U. S. 415, 421; *Grand Rapids Ry. Co.* v. *Osborn*, 193 U. S. 17, 29; *New York* v. *Manhattan Ry. Co.*, 143 N. Y. 2, 26, 29; *Matter of Cooper*, 93 N. Y. 507, 511; *Embury* v. *Conner*, 3 N. Y. 511, 516; 1 Lewis, Eminent Domain, 3d ed., § 311.

While there is a reasonable presumption of validity of the repealing acts, the court will not make violent presumptions in favor of such validity. The killing of a corporation by the legislature is not a trivial action. *People* v. *North River Sugar Co.*, 121 N. Y. 582. If the

statute may or may not be, according to circumstances, within the limits of legislative authority, the existence of the circumstances necessary to support it must be presumed. *Greenwood* v. *Freight Co.*, 105 U. S. 13, 22; *Sweet* v. *Rechel*, 159 U. S. 380, 392; *Willcox* v. *Gas Co.*, 212 U. S. 22; *Fletcher* v. *Peck*, 6 Cranch, 87, 128; *Sinking Fund Cases*, 99 U. S. 700, 718.

While there is a strong presumption that the journals of a legislative body are correct, Federal courts, under proper pleadings, have the power when contract rights are involved, to go behind the face of legislative acts and, also, of the journals, when a State claims it has annulled a private charter. *New Jersey* v. *Yard*, 95 U. S. 104, 113; *State* v. *Cincinnati Gas Light Co.*, 18 Ohio St. 262; *Cronise* v. *Cronise*, 54 Pa. St. 255.

Incorrect and defective legislative journals if made conclusive might have the indirect effect of nullifying a Federal power granted to the Supreme Court of the United States, and be constitutional inhibitions and restrictions against a State impairing the obligations of contracts or depriving one of property without due process of law. *Mugler* v. *Kansas*, 123 U. S. 623, 661; *Fairbank* v. *United States*, 181 U. S. 283, 294; *Postal Telegraph Co.* v. *Adams*, 155 U. S. 688, 698; *Smith* v. *St. Louis Ry. Co.*, 181 U. S. 248, 257.

The franchise right of the mortgagor to maintain, operate and extend its system as a going concern was valuable property; it could be separated from the company's franchise to live; it could be mortgaged to secure bondholders, and while the legislature might take away the charter life of the company, it could not do away with that part of the trust mortgage covering the franchise to run the system. *Railroad Commissioners* v. *G. R. & I. Ry. Co.*, 130 Michigan, 248, 253; *Vicksburg* v. *Water Works Co.*, 202 U. S. 453, 464; *New Orleans Ry. Co.* v. *Delamore*, 114 U. S. 501; *People* v. *O'Brien*, 111 N. Y. 2.

Mr. Ganson Taggart and *Mr. Moses Taggart*, with whom *Mr. Franz Kuhn*, Attorney General of the State of Michigan, was on the brief, for defendants in error:

The legislative journals are conclusive and are the only legitimate evidence of action taken. Sutherland, Stat. Const., §§ 30, 47, 50, 85; *Ches. & Pot. Tel. Co.* v. *Manning*, 186 U. S. 245; *Brewer* v. *Blougher*, 14 Pet. 178; *Burrows* v. *Delta Trans. Co.*, 106 Michigan, 603; Cooley on Const. Lim., 7th ed., §§ 240, 257; *Am. Coal Co.* v. *Consolidated Coal Co.*, 46 Maryland, 15; *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535; *Flint &c. Co.* v. *Woodhull*, 25 Michigan, 99; *State* v. *Gerhardt*, 145 Indiana, 434.

The legislative journals are the only evidence of the enactment of statutes and cannot be aided or contradicted by parol evidence. *Speer* v. *Mayor of Athens*, 85 Georgia, 49; *S. C.*, 9 L. R. A. 402; *Richie* v. *Richards*, 14 Utah, 371; *People* v. *Dettenthaler*, 118 Michigan, 599; *Attorney General* v. *Supervisors*, 89 Michigan, 552; *People ex rel. Hart* v. *McElroy*, 72 Michigan, 446; *S. C.*, 23 L. R. A. 340; Cooley on Const. Lim., 7th ed., 193; *Attorney General* v. *Rice*, 64 Michigan, 385.

A company cannot avoid the reserved right of repeal under its franchise, by mortgage or otherwise, so as to destroy that reservation, any more than a landowner can add to the title of which he may be seized by a conveyance of a larger interest than that actually owned, or by the transfer of the same to another party. Cooley on Const. Lim., 7th ed., 285, 391, 298; *Attorney General* v. *Looker*, 111 Michigan, 498; *Detroit* v. *Plank Road Co.*, 43 Michigan, 140; *Portland R. R. Co.* v. *Deering*, 78 Michigan, 61; *Commr. of Railroads* v. *G. R. & I. Ry. Co.*, 130 Michigan, 248; *Highland Park* v. *Plank Road Co.*, 95 Michigan, 489; *Smith* v. *Lake Shore Ry. Co.*, 114 Michigan, 460, 472; *Bissell* v. *Heath*, 98 Michigan, 472; *Grand Rapids* v. *Hydraulic Co.*, 66 Michigan, 606, 610; *Commonwealth* v.

Essex Co., 13 Gray, 239; *Gardner* v. *Hope Insurance Co.*, 9 R. I. 194; *Parker* v. *Railroad Co.*, 109 Massachusetts, 506; *Commissioners* v. *Holyoke*, 104 Massachusetts, 446; *State* v. *Maine Central R. R. Co.*, 66 Maine, 488; *Sprigg* v. *Western Union Tel. Co.*, 46 Maryland, 67; *Union Improv. Co.* v. *Commonwealth*, 69 Pa. St. 140; *State* v. *Commissioners*, 37 N. J. L. 228; *Illinois Cent. R. R. Co.* v. *People*, 95 Illinois, 313; *Rodemacher* v. *Mil. & St. Paul Ry. Co.*, 41 Iowa, 297; *Yeaton* v. *Bank of Old Dominion*, 21 Gratt. 593; *Ashuelot* v. *Elliott*, 58 N. E. Rep. 451; *S. C.*, 45 L. R. A. 647; Thompson on Corporations, § 89; *Henley* v. *State*, 98 Tennessee, 665; *Market St. Ry. Co.* v. *Hellman*, 109 California, 571; *State* v. *North. Cent. Ry. Co.*, 44 Maryland, 131, 165; *People* v. *O'Brien*, 111 N. Y. 152; *Wisconsin R. R. Co.* v. *Supervisors*, 35 Wisconsin, 257; *Gorman* v. *Pac. R. R. Co.*, 26 Missouri, 441.

The Federal courts recognize the same rule and the same right on the part of state legislatures to repeal charters of companies, where the right is reserved in the original franchise granted. *Tomlinson* v. *Jessup*, 15 Wall. 454; *Railroad Co.* v. *Maine*, 96 U. S. 499, 511; *Miller* v. *State*, 15 Wall. 478; *Holyoke Co.* v. *Lyman*, 15 Wall. 500; *Sinking Fund Cases*, 99 U. S. 700; *Munn* v. *Illinois*, 94 U. S. 113; *Gas Light Co.* v. *Hamilton*, 146 U. S. 258, 270; *Greenwood* v. *Freight Co.*, 105 U. S. 13; *Railroad Co.* v. *Georgia*, 98 U. S. 359; *Wisconsin Ry. Co.* v. *Powers*, 191 U. S. 379; *Lake Shore R. R. Co.* v. *Smith*, 173 U. S. 684; *Dartmouth College* v. *Woodward*, 4 Wheat. 518; *Merriwether* v. *Gerritt*, 102 U. S. 472; *G. R. & I. Ry. Co.* v. *Osborn*, 193 U. S. 17.

MR. JUSTICE HOLMES delivered the opinion of the court.

The judgment upon which this writ of error is based ousts the defendants (plaintiffs in error) from acting as a body corporate under the name of the Grand Rapids

Hydraulic Company. It was rendered, upon an information in the nature of *quo warranto*, by a County Court, and was affirmed by the Supreme Court of the State. 153 Michigan, 724. The case was heard on demurrer. The defendants pleaded that in 1849 the legislature incorporated the Grand Rapids Hydraulic Company, and that they were directors of the company; that the company had constructed and was maintaining an elaborate system of water supply; that in 1905 the legislature purported to repeal this charter, but that, owing to the manner in which the repeal was passed, as well as to the contents of the act purporting to effect it, the repeal was void under Article I, § 10, and the Fourteenth Amendment of the Constitution of the United States. Seemingly in aid of this contention, the defendants alleged the issue of bonds and a mortgage of the company's plant, including its franchise to own and operate the same, that still are outstanding. To this plea the State demurred.

As to the manner in which the repeal was obtained and passed, the plea alleged that the city of Grand Rapids was a rival of the company in furnishing water, and that the mayor and city authorities carried out an unfair scheme for getting the repeal hurried through the legislature without notice to the company. It set out the particulars with much detail. The defendants now, on the ground that there are limits even to the operation of a reserved power to repeal, argue that we should consider these allegations. But we do not inquire into the knowledge, negligence, methods or motives of the legislature if, as in this case, the repeal was passed in due form. *United States* v. *Des Moines Navigation & Railway Co.*, 142 U. S. 510, 544. The only question that we can consider is whether there is anything relevant to the present case in the terms or effect of the repeal that goes beyond the power that the charter expressly reserves.

The charter provides that "The legislature may at any

time hereafter amend or repeal this act." Act No. 223, Laws of 1849, § 11. Now, in the first place, with regard to the reference in argument to the bondholders, it is enough to say that they are not before the court. The defendants do not represent them; the defendants represent the debtors, not the creditors. By making a contract or incurring a debt the defendants, so far as they are concerned, could not get rid of an infirmity inherent in the corporation. They contracted subject not paramount to the proviso for repeal, as is shown by a long line of cases. *Greenwood* v. *Freight Co.*, 105 U. S. 13. *Bridge Co.* v. *United States*, 105 U. S. 470. *Chicago Life Insurance Co.* v. *Needles*, 113 U. S. 574. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 313, 338, 340. *New Orleans Waterworks Co.* v. *Louisiana*, 185 U. S. 336, 353, 354. *Knoxville Water Co.* v. *Knoxville*, 189 U. S. 434, 437, 438. *Manigault* v. *Springs*, 199 U. S. 473, 480. It would be a waste of words to try to make clearer than it is on its face the meaning and effect of this reservation of the power to repeal.

But the legislature did not content itself with a bare repeal and leave the consequences to the law. Act No. 492 of the Local Acts of 1905, after repealing the charter, provides that the company, at any time before January, 1906, may present a claim to the city of Grand Rapids for the value of its real and tangible estate, 'not including franchise,' and transfer the property to the city. If the parties do not agree an action of assumpsit may be brought, with the usual incidents, and the amount of the final judgment is made a claim against the city, to be paid like other claims. If the company does not elect this course, it may remove the property, first giving bond, to be approved by the common council, to protect the city from any damages caused thereby, and is to leave the streets in as good condition as before. It is argued that these provisions are void, and the argument may perhaps be abridged

as follows: Corporations with existence limited in time may take a fee simple or a franchise of longer duration than themselves. *Minneapolis* v. *Minneapolis Street Ry. Co.*, 215 U. S. 417, 430. *Detroit* v. *Detroit Citizens' Street Ry. Co.*, 184 U. S. 368, 394, 395. There is a distinction between the franchise to be a corporation and that to operate its plant. *Vicksburg* v. *Vicksburg Waterworks Co.*, 202 U. S. 453, 464. As the corporation had been authorized to lay its pipes, and lawfully had mortgaged not only its pipes but its franchise to own and operate them, it must be taken to have given a security not limited or terminable by anything short of payment. The attempt to extinguish the corporation, if successful, would render the security and continuing franchise unavailable and is void. It is argued further that the exclusion of 'franchise' (assumed to embrace the supposed franchise to operate the works) from the valuation is unconstitutional.

We express no opinion as to whether the premises of the foregoing argument are justified by anything appearing in the present record. In any event the conclusion cannot be maintained. If the city gave the privilege of using the streets to the corporation forever it could not enlarge the right of the corporation to continue in existence as against the sovereign power, as sufficiently appears from the cases already cited. See also *Arkansas Southern Ry. Co.* v. *Louisiana & Arkansas Ry. Co.*, *ante*, p. 431. The only question before us now is the validity of the judgment ousting the defendants from "assuming to act as a body corporate, and particularly under the name and style of the Grand Rapids Hydraulic Company." This really is too plain to require the argument that we have spent upon it. We may add that it is a matter upon which the bondholders have nothing to say. Moreover the question of parties is not open here. *New Orleans Waterworks Co.* v. *Louisiana*, 185 U. S. 336, 353, 354. *Commonwealth* v. *Tenth Massachusetts Turnpike Cor-*

poration, 5 Cush. 509, 511. Also, whether the provisions as to valuation do the bondholders or members of the corporation wrong is not before the court.

Judgment affirmed.